Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GARY E. ACKLES,

Petitioner,

v.

RICHARD F. LUTTRELL AND PLETCHER FLYING SERVICE, INC., A CORPORATION, N/K/A D & L FLYING SERVICE, INC., A CORPORATION; BRADY COEN; AIR CARE, INC., A FOREIGN CORPORATION AND ELF ATOCHEM NORTH AMERICA, INC., A FOREIGN CORPORATION

Respondents.

On Petition for Writ of Certiorari
to the Supreme Court for the State of Nebraska

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) pre-empt a manufacturer's state common-law duty to use due care to inform innocent third parties of the foreseeable risks involved in the use of dangerous products it manufactures and to use due care in selecting, training and supervising its workforce, purchasers and users?

RULE 14.1(b) STATEMENT

Petitioner Gary E. Ackles and Jeanne Ackles of Ord, Nebraska are individuals.

The only defendant affected by these proceedings is Elf Atochem North America, Inc., a corporation with its principal place of business in Pennsylvania. Elf Atochem North America, Inc. is the successor to Pennwalt Corporation, the manufacturer of the pesticide (Penncap-M, methyl parathion) involved in this litigation.

While other defendants were initially parties to the trial court petition (7a) the litigation has terminated as to all defendants except Elf Atochem North America, Inc.

Petitioner has no information concerning Elf Atochem North America, Inc.'s parent companies and non-wholly owned subsidiaries, if any.

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No. 97-

In The
Supreme Court of the United States
October Term, 1996

Gary E. Ackles,
Petitioner,

v.

Richard F. Luttrell and Pletcher Flying Service, Inc., a Corporation, n/k/a D & L Flying Service, Inc., a Corporation; Brady Coen; Air Care, Inc., a Foreign Corporation and Elf Atochem North America, Inc., a Foreign Corporation
Respondents.

On Petition for Writ of Certiorari to the Supreme Court for the State of Nebraska

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gary Ackles petitions for a writ of certiorari to review the judgment of the Nebraska Supreme Court concerning personal injuries petitioner sustained from exposure to a pesticide. The Nebraska Supreme Court held that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) pre-empted labeling-based common law causes of action against manufacturers that abide by FIFRA regulations. The Nebraska Court held FIFRA expressly pre-

empts state "requirements for labeling and packaging in addition to or different from" requirements under FIFRA, including petitioner's state-law claims for failure to warn and labeling based negligence and strict liability. Because the decision below is inconsistent with Medtronic, Inc. v. Lohr, 116 SCt. 2240 (1996), other decisions of this Court and FIFRA's administrative agency's interpretation of the Act, the petition for *certiorari* should be granted and the case vacated and remanded to the Nebraska Supreme Court.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Nebraska is reported at 252 Neb. 273, 561 NW2d 573 (1997) and is reproduced in the Appendix at 1a, rehearing denied, 2a. The unreported opinion of the District Court for the Eighth Judicial District of the State of Nebraska granting summary judgment against Petitioner is reproduced at 3a.

JURISDICTION

The Supreme Court of the State of Nebraska entered judgment on April 11, 1997. Petitioner filed a timely Motion for Rehearing which that Court denied on May 14, 1997. This Court has jurisdiction under §28 U.S.C. § 1257(a).

STATUTE INVOLVED

Section 24 of FIFRA, 7 U.S.C. § 136v, provides in pertinent part:

> Authority of States
> (a) In general - A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act.

(b) Uniformity - Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act.

STATEMENT OF THE CASE

A. The Structure of FIFRA

While FIFRA was before this Court in Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) and in Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 111 SCt. 2476 (1991), this Court has not yet considered whether and, if so, to what extent its pre-emption provision, § 136v(b), pre-empts state-law damage claims under this Court's pre-emption standards found at Medtronic v. Lohr, 116 S.Ct. 2240, at pages 2250-51 and other decisions of this Court. As this Court noted in Mortier, review begins with the observation:

> "Of particular relevance to this case, Section 24(a) specifies that states may regulate the sale or use of pesticides so long as the state regulation does not permit a sale or use prohibited by the Act. Section 136v(a)." 501 U.S. 597, 602. (1991).

FIFRA requires that the federal Environmental Protection Agency (EPA) make certain regulatory decisions regarding pesticides, but the Act rarely forbids a state or local government from supplementing EPA decisions. For example, a pesticide may generally not be sold or used in the United States without an EPA registration. 7 U.S.C. § 136a(a). Although states generally may not permit the sale or use of any pesticide not registered with EPA, states may regulate or even ban the sale and use of a federally registered pesticide. 7 U.S.C. § 136v(a). In this way, federal pesticide regulation establishes minimum standards that may be exceeded by additional state regulations.

Unlike federal statutes governing cigarettes and smokeless tobacco, FIFRA does not mandate precise wording for pesticide labels. *Cf.* 15 U.S.C. §§ 1333, 4402 (a)(1). Nor do EPA's regulations dictate the specific language to be used for the majority of pesticide labels.[1] Rather, as a part of an application for a pesticide registration, the manufacturer submits not only efficacy, health and environmental data, but also a draft label. 7 U.S.C. § 136a(c)(1)(C); 40 C.F.R. § 152.50(e). In this regard, EPA has made clear that "(t)he registrant must take responsibility for quality control of the product's composition and for adequate labeling describing the product, its hazards and uses." 53 Fed. Reg. 15,956 (May 4, 1988).

FIFRA and EPA do establish certain minimum requirements for pesticide labels. Pesticide labels must contain an EPA registration number, the registrant's name and address, the pesticide's name, brand or trademark, the net weight or other measure of content. The use classification of the pesticide, an ingredient statement, directions for use, a warning or cautionary statement that is adequate to protect health and the environment, and, for pesticides that are highly toxic to humans, see *supra* note 1, specific warnings and a description of appropriate first-aid treatment. 7 U.S.C. § 136(q)(1)(D), (G) & (2)(A)-(D); 40 C.F.R. § 156.10(a)(1). Any information required under FIFRA to be on a pesticide's label must be prominently and conspicuously placed in comparison to other labeling information that is not federally mandated. 7 U.S.C. § 136(q)(1)(E); 40 C.F.R. § 156.10(a)(2).

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[1]EPA requires signal words ("warning" or "caution") for four toxicity categories and precise precautionary statements for three. 40 C.F.R. § 156.10(h). The warnings and precautionary statements in connection with these categories generally must appear verbatim on the label.

Compliance with FIFRA's general labeling requirements does not necessarily satisfy the registrant's FIFRA (or other) obligations. To the contrary, a pesticide is misbranded if, notwithstanding EPA's registration of the pesticide and acceptance of the label, it fails to contain whatever additional warnings are necessary to protect against unreasonable adverse health and environmental effects. 7 U.S.C. § 136(q)(1)(F)-(G). Indeed, EPA has recognized that "(f)or liability reasons, companies often voluntarily provide additional information on the label, particularly in the area of precautionary statements." 49 Fed. Reg. 37960, 37971 (Sept. 26, 1984). Neither FIFRA nor EPA regulations prohibit the inclusion of additional label information or warnings, provided that the information does not violate any specific statute or regulator requirement. *Id.*

In short, EPA has long taken the position that FIFRA does not pre-empt state tort actions. For example, it has said:

> "one factor that would insure that pesticide manufacturers (and registrants which terms Petitioner and EPA for these purposes use interchangeably) sold an efficacious product: 'pesticide producers are aware that they are potentially subject to damage suits by the user community if their products prove ineffective in actual use.'" Pesticide Regulation (PR) Notice 96-4 Quoting 47 Fed. Reg. 40659, 40661 (col. 2) (September 15, 1982).). 5a, p. 3.

With respect to directions for use, pesticide labels must contain directions necessary to effectuate the product's intended purpose and adequate to protect against fraud, personal injury, and unreasonable health and environmental effects. 7 U.S.C. § 136(q)(1)(F); 40 C.F.R. § 156.10(i)(1)(i). Under EPA regulations, directions for use must specifically identify the crops to be treated,

the dosage rate associated with each site and pest, instructions for dilution, other application instructions needed to obtain effective results, and "(a)ny limitations or restrictions on use to prevent unreasonable adverse effects," "to non-target organisms." *Id.* §156.10(i)(2)(iii), (iv), (vi), (vii), (x); 40 C.F.R. §158.202.

Because EPA depends so heavily on manufacturer submissions, FIFRA imposes continuing obligations on registrants to submit complete, up-to-date information to EPA. Registrants have ongoing obligations to provide to EPA all factual information that they have regarding unreasonable adverse environmental effects, 7 U.S.C. § 136d(a)(2), and ongoing obligations to ensure that their labeling complies with FIFRA's requirements. 7 U.S.C. §§ 136(q), 136j(a)(1)(E).

Although § 136v(b) pre-empts state "labeling or packaging" requirements "in addition to or different from" FIFRA requirements, the Act expressly leaves manufacturers of registered pesticides many other unrestricted means of conveying information to purchasers and users. For example, EPA's regulations identify the following means of conveying information: "(b)rochures, pamphlets, circulars and similar material offered to purchasers at the point of sale or by direct mail; (n)ewspapers, magazines, newsletters and other material in circulation or available to the public; (b)roadcast media such as radio and television; (t)elephone advertising; and (b)illboards and posters." 40 C.F.R. § 152.168(b). Unlike labeling, manufacturers do not submit such materials to EPA for review and approval as part of the registration process.[2]

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[2]The submitted labeling is limited to "the written, printed, or graphic matter on, or attached to, the pesticide or devise or any of its containers or wrappers," or other detached written matter accompanying the pesticide, such as an instructional booklet, that serves the same purpose as a label. 7 U.S.C. §

If a pesticide label contains false or misleading statements or lacks directions for use and warnings that are adequate to protect health and the environment, the pesticide is misbranded. 7 U.S.C. §§ 136(q)(1), 136j(a)(1)(E), 136j(a)(2)(C) & (M). In an administrative action to cancel a pesticide's registration or to seize or bar use or sale, EPA registration is not a defense. 7 U.S.C. §§ 136(q)(1)(A), 136a(f)(2). Violations warranting EPA action include labeling that lacks required information and products that cause unreasonable environmental effects even when used as directed on the label. 7 U.S.C. §§ 136j and 136k; *see also id.* § 136l (authorizing civil and criminal penalties for FIFRA violations).

FIFRA provides no remedy to compensate individuals who sustain damages from pesticide use. See R. David Allnutt, *FIFRA Pre-emption of State Common Law Claims After* Cipollone v. Liggett Group, Inc, 68 WASH. L. REV. 859 at 867 (1993)

B. Facts and Trial Court Proceedings

On August 2, 1991 Petitioner, a rural mail carrier, was exposed to pesticide[3] Penncap-M (methyl parathion) manufactured by Pennwalt Corporation while delivering mail along his usual route. Respondent Elf Atochem is successor to Pennwalt, the manufacturer of the pesticide at issue in this case. Upon being exposed Petitioner experienced nausea, shaking, diarrhea, and vomiting. He was hospitalized, has continued to experience severe physical ailments

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136(p)(1) & (2)(A).

[3]"Footnote 1. For purposes of our discussion of FIFRA, the term "pesticides" includes herbicides, insecticides, fungicides, rodenticides and plant regulators (see 2(t) and (u) of FIFRA as amended 7 U.S.C. 136(t) and (u))." Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) at page 994.

and has been declared disabled from his job as a postal carrier. He sued the applicators (First Cause of Action) and the manufacturer (Second Cause of Action) for negligence and the manufacturer (Third Cause of Action) for strict liability. 7a. From its label, the manufacturer acknowledges it knew Penncap-M had a "very high acute toxicity to humans" and the manufacturer would have some responsibility to make sure:

1. Application would be done under the direct "physically present" supervision of a certified applicator.

2. Commercial certified applicators must ensure "all persons involved in the activities are informed of the precautionary statements."

3. All unprotected persons would be warned, vacated and kept away from the treated area or where there is danger of drift during application and for 24 hours thereafter. Among the statements on the manufacturer's label producing the inferences of danger and knowledge to this effect is the manufacturer's statement that "human flaggers are prohibited."

4. Persons in contact with Penncap-M must wear specified, chemical resistant, protective clothing, wash the same with soap and water and "contact physician immediately." 6a

From its label, the manufacturer also acknowledged it knew:

1. State and local regulations governed at least the destruction and burning of heavily contaminated protective clothing and equipment.

2. If Penncap-M-contaminated waste cannot be disposed of according to label instructions, state pesticide, environmental control authority or the nearest Hazardous Waste representative at the nearest EPA office was to be contacted.

3. Protective information could be obtained from the Cooperative Extension Service, a state entity. 6a.

The manufacturer's Answer does not allege in what respect or respects, if any, Nebraska labeling or packaging requirements are not equal to or substantially identical to federal FIFRA requirements. 8a.

On August 15, 1994 the manufacturer filed Motion for Summary Judgment which the trial court granted January 9, 1995, (Journal Entry filed January 20, 1995) on the theory FIFRA expressly pre-empted failure to warn and labeling claims. 3a.

Petitioner appealed the grant of summary judgment in favor of the manufacturer. On February 28, 1996 the Nebraska Supreme Court, on its own motion, moved this case from the Court of Appeals docket to the Supreme Court docket.

C. THE DECISION OF THE NEBRASKA SUPREME COURT

The Nebraska Supreme Court found Congress had pre-empted labeling-based common-law causes of action against chemical manufacturers that abide by the regulations of FIFRA. Accordingly, the Nebraska Court affirmed summary judgment in favor of the manufacturer regarding the strict liability cause of action and, while holding that Petitioner' failure to warn or labeling-based cause of action for negligence is pre-empted by FIFRA, reversed the District Court's granting of summary judgment against the manufacturer as it relates to the negligence cause of action and

remanded that cause of action with orders that Petitioner be given an opportunity to amend his petition to allege negligence other than negligence based on failure to warn or labeling.

The Nebraska Court began its pre-emption analysis by reference to FIFRA's "comprehensive scheme for the regulation of pesticide labeling and packaging. See Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991)." and the review process for the label which "must address numerous concerns, including ingredients, directions for use, and adverse effects of the product. See, s 136a(c); 40 C.F.R. s 152.50 & part 156 (1996)." 1a.

The Nebraska Court then focused on FIFRA's pre-emption provisions, 7 U.S.C. § 136v(b). (1a). After noting "The U.S. Supreme Court has not had the occasion to address the FIFRA pre-emption issue concerning common-law causes of action against an insecticide manufacturer," the Nebraska Court went on to compare FIFRA's language with that found in Cipollone v. Liggett Group Inc., 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) and, while acknowledging the language was "not identical", found "(E)very federal court of appeals that has addressed the issue before us has, in the wake of the Cipollone decision, held that both failure-to-warn and labeling-based claims brought under common-law causes of action against manufacturers of pesticides are pre-empted by s 136v." (1a)

The Nebraska Court then stated this court "has revisited the field of pre-emption analysis with its decision in Medtronic Inc. v. Lohr, which focused on the term "requirement" in concluding that the common-law actions against the manufacturer were not pre-empted" but in the language of Medtronic: ""Requirement" appears to presume that the State is imposing a specific duty upon the manufacturer, and although we have on prior occasions concluded that a statute pre-empting certain state "requirements" could also

pre-empt common-law damages claims, see Cipollone, 505 U.S., at 521-522, 112 S.Ct., at 2620 (opinion of STEVENS, J.), that statute did not sweep nearly as broadly as Medtronic would have us believe that this statute does. 116 S.Ct. at 2251." 1a.

Relying on the interpretation placed on FIFRA after Medtronic by Lewis v. American Cyanamid Co., 294 N.J.Super. 53, 682 A.2d 724 (1996) and Grenier v. Vermont Log Bldgs., Inc., 96 F.3d 559 (1st Cir.1996), the Nebraska Court disagreed with Petitioner's analysis of Medtronic, and, instead, saw the manufacturer "between the proverbial rock and hard place in that it would be required to use the label approved by the EPA, yet pay damages because a jury determined that such label was not sufficient." 1a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISIONS IN, MORTIER, SILKWOOD AND MEDTRONIC

The Nebraska decision is inconsistent with this Court's decisions in Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991), Silkwood v. Kerr-McGee, 464 U.S. 238 (1984) and Medtronic v. Lohr, ___ U.S. ___, 116 SCt. 2240 (1996). In Mortier, this Court made an extensive review of FIFRA's legislative history (see 501 U.S. 597, 609-10 and 613-14), found it to be "complex and ambiguous" (501 U.S. 597, 612) and held: "FIFRA does not pre-empt the town's ordinance either explicitly or implicitly or by virtue of an actual conflict." 501 U.S. 597, 606.

Mortier involved a specific local ordinance that required "the permittee to post placards giving notice of the pesticide use and of any label information prescribing a safe reentry time" (501 U.S. 597, 603), a requirement functionally equivalent to the general common

law duty the manufacturer owed petitioner. A manufacturer of a dangerous substance has a general common-law duty in Nebraska of "taking suitable precautions to avoid injury." Rose v. Buffalo Air Service, 170 Neb. 806, 104 NW2d 431 (1960). In holding FIFRA "is wholly inadequate to convey an express pre-emptive intent on its own" this Court said:

> "Section 136(v) plainly authorizes the 'states' to regulate pesticides and just as plainly is silent with reference to local governments. Mere silence, in this context, cannot suffice to establish a 'clear and manifest purpose' to pre-empt local authority." Mortier, *supra*, 501 U.S. 597, 607.

Finally, Mortier is significant because it means this court has already specifically held field pre-emption cannot be inferred from FIFRA. (501 U.S. 597, 612).

Silkwood held a state common law award of punitive damages (ten million dollars) in addition to $500,000 compensatory damages was not pre-empted by the Federal Atomic Energy Act. 464 U.S. 238, 245. After pointing out there was no indication Congress even seriously considered precluding the use of such remedies when it enacted or amended the Act, the Silkwood court went on to say:

> "This silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 464 U.S. 238, 251 and 255-266.

The Nebraska Court's "rock and hard place" analysis conflicts with the analysis of Section 136(v) of FIFRA found in Mortier where a pesticide applicator raised the:

> "specter of gypsy moth hoards safely navigating through thousands of contradictory and ineffective municipal regulations," (this Court said) "Congress is free to find that local regulation does wreck such havoc and enact legislation with the purpose of preventing it. We are satisfied, however, that Congress has not done so yet." Mortier, *supra*, 501 U.S. 597, 615 (Emphasis supplied).

The key language before this Court in Medtronic:

> ("'no such state or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under [the MDA] to the device'" x x x 116 S.Ct. 2240 at page 2243)

is identical to that found in FIFRA ("such states shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under the Act.") 4a.

Due to the similarities between the MDA and the FIFRA, Petitioner asks the Court to hold this case until it decides Kernats v. Smith Indus. Med. Sys. Inc. 669 N.E.2d 1300 (Ill. App. C. 1996), (cert pending as No. 96-1405) unless, of course, the Court grants the petition in the instant case.

At this time, however, the Nebraska decision conflicts with how this Court analyzes a pre-emption case (Medtronic v. Lohr, ___ U.S. ___, 116 S.Ct. 2240 at pp. 2250-51) and the majority decision in Medtronic that "pre-emption occur only where a particular state

requirement threatens to interfere with a specific federal interest." 116 S.Ct. 2240 at page 2257. (Emphasis supplied).

As this Court in Medtronic has said:

> "such additional elements of the state-law cause of action would make the state requirements narrower, not broader, than the federal requirement. While such a narrower requirement might be "different from" the federal rules in a literal sense, such a difference would surely provide a strange reason for finding pre-emption of a state rule insofar as it duplicates the federal rule. The presence of a damages remedy does not amount to the additional or different "requirement" that is necessary under the statute; rather, it merely provides another reason for manufacturers to comply with identical existing "requirements" under federal law." 116 S.Ct. 2240 at 2255.

Accordingly, under this Court's decisions in Mortier, Silkwood and Medtronic this Court should grant the petition for writ of *certiorari*.

II. THE DECISION BELOW IS INCONSISTENT WITH THE ADMINISTRATIVE AGENCY'S INTERPRETATION OF FIFRA AND THIS COURT'S DECISIONS IN RUTHERFORD AND HILLSBOROUGH

Next, the Nebraska Supreme Court's decision in Ackles conflicts with the administrative agency's (EPA) interpretation of the Act. (Pesticide Regulation (PR) Notice 96-4 dated June 3, 1996). 5a. That is, at least since 1982, the EPA has made its position that "pesticide producers are aware they are potentially subject to damage suits" of public record. 5a, p. 3.

In such circumstances, this Court has instructed that "the construction of a statute by those charged with its administration is entitled to substantial deference." United States v. Rutherford, 442 U.S. 544, 553 (1979). Moreover, this Court has deemed an agency's interpretation of its own regulations "dispositive" on the issue of pre-emption of state law. Hillsborough County v. Automated Medical Lab., Inc., 471 U.S. 707, 714 (1985).[4]

EPA has consistently adhered to its view that FIFRA does not pre-empt product liability. As this Court noted in Mortier, *supra*, the EPA discerns "no actual conflict between FIFRA and local regulation generally." 501 U.S. 597, 614. Under these circumstances, the Court should grant the petition for writ of *certiorari*.

III. THE NEBRASKA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Nebraska Supreme Court concluded:

> "Through its enactment of FIFRA, Congress has pre-empted labeling-based common-law causes of action against chemical manufacturers that abide by the regulations of FIFRA. We therefore affirm the

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[4]As Justice Breyer pointed out in his concurrence in Medtronic, *supra*, an administrative agency's: "responsibility means informed agency involvement and, therefore, special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives." 116 S.Ct. 2240, 2260.

summary judgment in favor of Pennwalt regarding Ackles' strict liability cause of action. Because summary judgment was inappropriately entered against Ackles' negligence action, we remand the cause with directions." App. 1a.

However, in remanding to replead, the Nebraska Court noted "that, in accordance with the foregoing analysis, a failure-to-warn or labeling-based cause of action is pre-empted by FIFRA." 1a.

AN INNOCENT BYPASSER
SHOULD NOT BE PRE-EMPTED

Petitioner was not an employee, purchaser, voluntary user or voluntary consumer of this pesticide. He was simply an innocent bypasser who did not receive the warning to which he was entitled under Nebraska common law. The two post-Medtronic cases upon which the Nebraska Supreme Court relied (Lewis and Grenier, *supra*) did not involve an innocent bypasser. 1a.

At least two courts, one state and one federal, (New Jersey and New York) have held FIFRA pre-empted common-law claims are not pre-empted when innocent third parties are involved. Macrie v. SDS Biotech Corp., 267 NJ Super 34, 630 A2d 805 (1993). ("Mortier, Allenby, Jorling, and Burke convince us that, consistently with FIFRA, State law may require a pesticide manufacturer like defendant to take reasonable steps, either through instructions to its customers or directly through its own efforts, to assure that persons, like plaintiffs, who handle produce bought directly from farmers who have used Bravo 500, will be warned of its dangers, at least by receiving defendant's brochures in the form prescribed by the E.P.A." *Supra* at 48-9, 630 A2d 805 at 813, Weinstein, J.), and Burke v. Dow Chemical Co., 797 F. Supp. 1128 (E.D. NY, 1992), (FIFRA based motion for summary judgment denied in products action filed against a manufacturer of active ingredient in household

insecticide and manufacturer of final product alleging that children became brain damaged through their mother's exposure to insecticide while pregnant).

In addition to Mortier, *supra*, at least one other court has concluded state-required point-of-warning signs are not pre-empted by FIFRA's labeling and warning provisions. Chemical Specialties Manufacturers Association Inc. v. Allenby, 958 F2d 941 (CA 9 1992). After describing the split in authority, the Allenby court went on to point out:

> "The great split in authority is important to illustrate that even when the consequences of state action clearly pressure companies to change their FIFRA labels, there is no consensus on whether the state action is pre-empted."
>
> "(A) national safety standard would ease the burden of compliance for chemical product manufacturers (x x x but) would take police powers away from the states who best know how to serve the interests of their citizenry." 958 F2d 941 at 948. (1992)

Suffice it to say, the state of the law has left us with a procedural muddle which only this Court can resolve.

Moreover, an innocent bypasser should be entitled to the protection of a manufacturer's general duty to inform those who could foreseeably be injured by potentially dangerous items of the risks involved in their use regardless of whether he lives in Wisconsin, New York, California, New Jersey or Nebraska. Unless this court resolves that conflict, no manufacturer will know what its duty is and no citizen will know what his protection is. As this Court has pointed out, "inability to provide redress x x x vitiates the ordinary arguments for pre-emption" and "creates disrespect for the

law." Linn v. Plant Guard Workers, 383 U.S. 53, 63, 67.

At the least, an innocent bypasser should have the protection of this Court's presumption against pre-emption for the reasons summarized by the Allenby court as follows:

> ""[F]ederal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). We have noted two practical reasons for this presumption. First, Congress has the power to make pre-emption clear in the first instance. Second, if the court erroneously finds pre-emption, the State can do nothing about it, while if the court errs in the other direction, Congress can correct the problem. Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 488 (9th Cir.1984), cert. denied, 471 U.S. 1140, 105 S.Ct. 2686, 86 L.Ed.2d 703 (1985). [3] In particular, "regulation of health and safety matters is primarily, and historically, a matter of local concern." Hillsborough County v. Automated Med. Labs, Inc., 471 U.S. 707, 719, 105 S.Ct. 2371, 2378, 85 L.Ed.2d 714 (1985). Consequently, courts should be especially unlikely to find pre-emption of state laws in these areas. See id." 958 F2d 941 at 943. (1992). (Emphasis supplied).

Just as this court has recognized the chemical company's property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent

source such as state law" (Ruckelshaus v. Monsanto Co. 476 US 986 at 1001 (1984)), Ruckelshaus also recognized Congressional pre-emption:

> ""by ipse dixit, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S., at 164." 467 U.S. 986, 1012

For at least the last 112 years, this court has recognized:

> "If the (police power) laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law." Missouri Pac. R. Co. v. Humes, 115 U.S. 512, 520 (1885).

This Court clearly recognized state law a year ago when it held:

> "The legal duty that is the predicate for the Lohrs' negligent manufacturing claim is the general duty of every manufacturer to use due care to avoid foreseeable dangers in its products. Similarly, the predicate for the failure to warn claim is the general duty to inform users and purchasers of potentially dangerous items of the risks involved in their use. These general obligations are no more a threat to federal requirements than would be a state-law duty

> to comply with local fire prevention regulations and zoning codes, or to use due care in the training and supervision of a workforce. These state requirements therefore escape pre-emption, not because the source of the duty is a judge-made common-law rule, but rather because their generality leaves them outside the category of requirements that s 360k envisioned to be "with respect to" specific devices such as pacemakers. As a result, none of the Lohrs' claims based on allegedly defective manufacturing or labeling are pre- empted by the MDA." Medtronic Inc. v. Lohr, 116 SCt. 2240 decided 06/26/96 at page 2258, at Section V.

As this Court recognized last month, ours is a system of "dual sovereignty" (Printz, Sheriff/Coroner, Ravalli County, Montana v. United States, No. 95-1478, decided June 27, 1997, p. 10) and a failure to reverse the Nebraska Supreme Court will produce another unfunded mandate which Printz specifically disapproved. *Supra*, p. 14.

Unless reversed, the Nebraska decision in Ackles will, for all practical purposes, produce "an anomaly in the law, a (virtual) Constitutional right to ignore neutral laws of generally applicability", an anomaly this Court struck down last month in City of Boerne v. Flores, Archbishop of San Antonio, et al., decided June 25, 1997, p. 4. The Nebraska Court's interpretation of FIFRA would unconstitutionally take the Petitioner's family property by denying an innocent bypasser the opportunity to earn a living for his family and at the same time would unconstitutionally create a property right in the chemical company by unconstitutionally furnishing that chemical company immunity from accountability for foreseeable injuries its product caused. Like the act Congress struck down in the Flores case, the Nebraska Supreme Court's construction of FIFRA: "reflects a lack of proportionality or congruence between

the means adopted and the legitimate end to be achieved." *Supra*, p. 14.

As such:

> "This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." Flores, *supra*, p. 15.
>
> As this court has said:
>
> "(E)ven if a pre-existing state-law remedy 'is a species of "property" protected by the Due Process Clause . . ., it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.'" Pruneyard Shopping Center v. Robins, 447 U.S. 74, 92 (1980).

Finally, the construction given FIFRA by the Nebraska Supreme Court as applied to an innocent bypasser fails to meet the due process standard this court required in Duke Power Co. v. Carolina Environmental Study Group, 438 US 59 (1978). (The Price-Anderson Act provides a reasonably just substitute for the common-law or state tort law remedies it replaces). FIFRA offers no such substitute.

CONCLUSION

This Court should grant the petition for writ of *certiorari*.

RESPECTFULLY SUBMITTED this 28th day of July, 1997.

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GARY E. ACKLES, APPELLANT,

V.

RICHARD F. LUTTRELL ET AL., APPELLEES.

--- N.W.2d ----

252 Neb. 273

Filed April 11, 1997. No. S-95-257.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld on appeal in the absence of an abuse of that discretion.
2. **Summary Judgment.** Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Federal Acts: Claims.** Failure-to-warn and labeling-based claims brought under common-law causes of action against manufacturers of pesticides are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act.
5. **Negligence: Proof.** In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages.
6. **Negligence: Pleadings.** A bare allegation of proximate cause and damages without providing information as to what negligence occurred fails to set forth a negligence cause of action.
7. **Summary Judgment.** A motion for summary judgment is not intended to be used as a substitute for a demurrer or motion for judgment on the pleadings. [274]

Appeal from the District Court for Valley County: RONALD D. OLBERDING, Judge.

Mandy L. Strigenz and E. Terry Sibbernsen, of E. Terry Sibbernsen, P.C., and J. Marvin Weems, P.C., for appellant.

Brian D. Nolan, of Nolan, Roach & Lautenbaugh, and Daniel J. Connolly and Mark J. Carpenter, of Faegre & Benson, P.L.L.P., for appellee Elf Atochem North America, Inc.

WHITE, C.J.., CAPORALE, WRIGHT, CONNOLLY, AND GERRARD, JJ., AND COADY, D.J.

CONNOLLY, J.

The appellant, Gary E. Ackles, brought this negligence and strict liability action against, among others, the appellee Pennwalt Corporation, now known as Elf Atochem North America, Inc. (Pennwalt), seeking damages for personal injuries sustained as the result of being exposed to an insecticide manufactured by Pennwalt. The district court granted Pennwalt's motion for summary judgment, finding that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempted Ackles' failure-to-warn and labeling based claims. We affirm in part, because we conclude that FIFRA preempts labeling-based claims. However, we remand Ackles' negligence cause of action because it did not effectively state a cause of action, thereby making a summary judgment disposition inappropriate.

BACKGROUND

On August 2, 1991, Ackles, a U.S. mail carrier, was delivering mail when he became exposed to Penncap-M which was being sprayed on an adjacent cornfield by a crop duster. Penncap-M is an insecticide manufactured by Pennwalt. Upon being exposed to the insecticide, Ackles experienced nausea, shaking, diarrhea, and vomiting. Since the exposure, Ackles has experienced severe

physical ailments and has been declared disabled from his job as a postal carrier.

Penncap-M, like all insecticides, is subject to regulation and approval by the federal Environmental Protection Agency (EPA). See 7 U.S.C. s 136a(a) (1988). Pursuant to FIFRA, [275] 7 U.S.C. s 136 et seq. (1988 & Supp. II 1990), the EPA must review and approve proposed labeling prior to any sale or distribution of the product. In the instant case, it is undisputed that the EPA reviewed and approved the Penncap-M labeling prior to Ackles' injury.

Ackles filed suit against the crop duster and Pennwalt. In his sixth amended petition, Ackles brought two causes of action against Pennwalt: one sounding in negligence, with the second based on strict liability in tort. The crux of these causes of action was that Pennwalt failed to warn or convey appropriate information regarding Penncap-M to those persons applying the insecticide. Ackles contended in both causes of action that this failure was the proximate cause of his personal injuries.

In its order, the district court overruled the crop duster's motion for summary judgment, but granted Pennwalt's motion for summary judgment, holding that

> [Ackles'] failure to warn and labeling claims, found in ... Causes of Action 2 and 3 of the 6th Amended Petition, present a state law challenge to the EPA-approved Penncap-M label, which challenge is expressly preempted by s 136v(b) of the Federal Insecticide Fungicide and Rodenticide Act, 7 U.S.Code s 136 et seq.

In a later order, the district court overruled Ackles' motion for new trial. Ackles appeals.

ASSIGNMENTS OF ERROR

Ackles contends the district court erred in overruling his motion for a new trial because (1) it was error to find that his failure-to-warn claim, in the second cause of action, was expressly preempted by FIFRA and (2) it was error to find that his labeling

claim, in the third cause of action, was also preempted by FIFRA.

STANDARD OF REVIEW

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld on appeal in the absence of an abuse of that discretion. *Menkens v. Finley*, 251 Neb. 84, 555 N.W.2d 47 (1996); *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996). [276]

Summary judgment is to be granted when there is no genuine issue of material
fact and the moving party is entitled to judgment as a matter of law. *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996); *Bogardi v. Bogardi*, 249 Neb. 154, 542 N.W.2d 417 (1996).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997); *Olson v. SID No. 177*, 251 Neb. 380, 557 N.W.2d 651 (1997).

ANALYSIS

This appeal presents the issue of whether failure-to-warn and labeling-based claims brought against the manufacturer of a chemical that is regulated by FIFRA are preempted.

We begin with Ackles' assigned error concerning the granting of summary judgment in favor of Pennwalt against Ackles' strict liability cause of action. In this cause of action, Ackles contends Pennwalt is strictly liable for placing a defective product, namely Penncap-M, into the stream of commerce. According to the sixth amended petition, the defects referred to are the
following, and Pennwalt was negligent:

> a. In failing to adequately and properly warn users of, and other persons who will forseeably [sic] be endangered by, the product known as Penncap-M of the toxic nature of the product;

b. In failing to provide written instructions to aerial applicators of the product known as Penncap-M as to the manner in which the product should be applied; and,

c. In placing on the market for use a product which is toxic and creates an unreasonably dangerous condition when human beings such as the Plaintiff become exposed to the product.

The district court granted summary judgment in favor of Pennwalt on the third cause of action, holding that FIFRA preempted the claim. Ackles appeals that ruling, contending FIFRA does not preempt his labeling claim put forth in the third cause of action. We note that an examination of subparagraph c of paragraph 34 reveals that it deals exclusively with the alleg- [277] ation that Penncap-M is "unreasonably dangerous" and as such does not appear, on its face, to be a labeling claim. However, because Ackles' sole assigned error concerning his strict liability action relates only to the district court's entering summary judgment against his labeling claim in the strict liability cause of action, we offer no opinion as to whether subparagraph c is itself preempted by FIFRA, insofar as that issue was not preserved for appeal. See *Daehnke v. Nebraska Dept. of Soc. Servs.*, 251 Neb. 298, 557 N.W.2d 17 (1996) (errors not assigned will not be considered by appellate court). Therefore, our concern in this appeal is whether FIFRA preempts labeling-based strict liability claims against a manufacturer of an insecticide, such as those claims set forth in subparagraphs a and b.

Originally enacted in 1947, FIFRA establishes a comprehensive scheme for the regulation of pesticide labeling and packaging. See *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991). The administrative agency in charge of setting appropriate regulations is the EPA. Before a pesticide may be sold, it must be registered and its labeling approved by the EPA. s 136a(a). The review process requires that an applicant submit a proposed label to the EPA for approval. This label must address numerous concerns, including ingredients,

directions for use, and adverse effects of the product. See, s 136a(c); 40 C.F.R. s 152.50 & part 156 (1996). In addition to the written material on the actual container, the term "label" also includes written, printed, or graphic material accompanying the container, to which reference is made. s 136(p). Once the label is approved, FIFRA makes it unlawful for any person to alter it without the prior approval of the EPA. See s 136j(a)(2)(A).

FIFRA specifically sets forth the authority the states shall have concerning the labeling of pesticides. Section 136v provides, in part:

> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA].
>
> (b) Uniformity [278]
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].

It is the preemption effect of subsection (b) that is at issue in this case. We are asked to determine whether this provision preempts a common-law cause of action brought against a manufacturer based on inadequate labeling if the manufacturer complied with the requirements of FIFRA.

The U.S. Supreme Court has not had the occasion to address the FIFRA preemption issue concerning common-law causes of action against an insecticide manufacturer. However, in 1992 the Court decided *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), which involved a suit brought against three cigarette manufacturers by the husband of a woman who died of lung cancer after having smoked for 40 years. The action was based on the common-law claims of design defects, failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud. The defendant manufacturers argued that the Public Health Cigarette Smoking Act of 1969(Act) preempted the

common-law causes of action. The preemption clause of the Act provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this [Act]." 15 U.S.C. s 1334(b) (1994).

A plurality of the Court held that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." *Cipollone*, 505 U.S. at 521. See, also, *id.* at 548 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Thomas, J.) (" 'the language of the [1969] Act plainly reaches beyond [positive] enactments' "). The Court went on to note, however, that the preemption clause does not preempt all common law, but, rather, only those actions predicated on a theory that necessarily interferes with the Act. Thus, it was determined that the plaintiff's failure-to-warn claim was preempted because it was specifically at odds with the labeling [279] requirement set forth in the Act, with which the manufacturer complied.

While not identical, the language employed in the preemption clause of FIFRA, s 136v(b) ("shall not impose or continue in effect any *requirements* for labeling" (emphasis supplied)), closely parallels that used in 15 U.S.C. s 1334(b) of the Act ("[n]o *requirement or prohibition* based on smoking and health shall be imposed under State law" (emphasis supplied)). Cognizant of this similarity, every federal court of appeals that has addressed the issue before us has, in the wake of the *Cipollone* decision, held that both failure-to-warn and labeling-based claims brought under common-law causes of action against manufacturers of pesticides are preempted by s 136v. See, *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir.1995); *Taylor Ag Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir.1995); *Lowe v. Sporicidin Intern.*, 47 F.3d 124 (4th Cir.1995); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887

(8th Cir.1994); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir.1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir.1993); *King v. E.I. Dupont De Nemours and Co.*, 996 F.2d 1346 (1st Cir.1993), *cert. dismissed* 510 U.S. 985, 114 S.Ct. 490, 126 L.Ed.2d 440; *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir.1993); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.1993), *cert. denied* 510 U.S. 913, 114 S.Ct. 300, 126 L.Ed.2d 248; *Arkansas-Platte & Gulf v. Van Waters & Rogers*, 981 F.2d 1177 (10th Cir.1993), *cert. denied* 510 U.S. 813, 114 S.Ct. 60, 126 L.Ed.2d 30.

In addition, our research reveals that numerous state appellate courts in other jurisdictions have also held that FIFRA preempts labeling-based common-law causes of action. See, e.g., *Schuver v. E.I. Du Pont de Nemours & Co.*, 546 N.W.2d 610 (Iowa 1996); *Hottinger v. Trugreen Corp.*, 665 N.E.2d 593 (Ind.App.1996); *Hochberg v. Zoecon Corp.*, 421 Mass. 456, 657 N.E.2d 1263 (1995); *Quest Chemical Corp. v. Elam*, 898 S.W.2d 819 (Tex.1995); *All-Pure Chemical Co. v. White*, 127 Wash.2d 1, 896 P.2d 697 (1995); *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 886 P.2d 869 (1994).

Subsequent to the decisions of these courts, the U.S. Supreme Court has revisited the field of preemption analysis [280] with its decision in *Medtronic, Inc. v. Lohr*, U.S., --- U.S. ----, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). The Court, in *Medtronic, Inc.*, was asked to determine whether the preemption clause of the Medical Device Amendments of 1976(MDA) to the Federal Food, Drug, and Cosmetic Act precluded common-law damage claims against the manufacturer of a cardiac pacemaker which was regulated by the MDA. The preemption language at issue provided:

> (a) General rule
>
> Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement--
>
> (1) which is different from, or in addition to, any

requirement under this chapter to the device....

21 U.S.C. s 360k (1994).

Aware of its previous decision in *Cipollone*, the *Medtronic, Inc.* Court focused on the term "requirement" in concluding that the common-law actions against the manufacturer were not preempted. A plurality of the Court reasoned that

> if Congress intended to preclude all common-law causes of action, it chose a singularly odd word with which to do it. The statute would have achieved an identical result, for instance, if it had precluded any "remedy" under state law relating to medical devices. "Requirement" appears to presume that the State is imposing a specific duty upon the manufacturer, and although we have on prior occasions concluded that a statute pre-empting certain state "requirements" could also pre-empt common-law damages claims, see *Cipollone*, 505 U.S., at 521-522, 112 S.Ct., at 2620 (opinion of STEVENS, J.), that statute did not sweep nearly as broadly as Medtronic would have us believe that this statute does.

116 S. Ct. at 2251.

According to the plurality, the Act at issue in *Cipollone* prohibited state requirements that were "based on smoking and health." 15 U.S.C. s 1334(b). The plurality was quick to point out that those common-law claims not based on smoking and health were not preempted. Concerning the MDA in *Medtronic,* [281] *Inc.*, however, it was determined that an examination of the entire act makes it apparent that the term "requirements," as used throughout, "is linked with language suggesting that its focus is device-specific enactments of positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries." --- U.S. at ----, 116 S.Ct. at 2252. However, five Justices of the Court reiterated the sentiments put forth in *Cipollone* that state common-law claims can be equated with state requirements. See *Medtronic, Inc.*, *supra* (Breyer, J., concurring in part and concurring in the judgment) and (O'Connor,

J., concurring in part and dissenting in part, joined by Rehnquist, C.J., and Scalia and Thomas, JJ.).

Thus, while at first blush *Medtronic, Inc.* appears to retreat from the preemption analysis put forth in *Cipollone*, it was the separate and distinct statutes that were involved in each case that were the determining factor. We therefore must determine whether the preemption language used in FIFRA preempts labeling-based common-law actions, as was the case in *Cipollone*, or whether FIFRA is more analogous to the statutory scheme of the MDA, which was at issue in *Medtronic, Inc.*

Two courts have recently examined FIFRA's preemption language in the aftermath of *Medtronic, Inc.* and have concluded that common-law actions for failure to warn and labeling-based claims are preempted. In *Lewis v. American Cyanamid Co.*, 294 N.J.Super. 53, 682 A.2d 724 (1996), the court ruled that a failure-to-warn claim against a manufacturer was preempted by FIFRA. Recognizing the U.S. Supreme Court's apparent retreat from preemption in *Medtronic, Inc.*, the court concluded that the preemption language employed in FIFRA was more similar to the statutory language examined in *Cipollone*. The court reasoned that

> [l]ike the preemption clause at issue in Cipollone and unlike that in *Medtronic*, the preemption provision of FIFRA is precise and explicit; i.e., a State "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." Furthermore, FIFRA, like the *Cipollone* statutes, leaves unconstrained all state common law causes of action for defective products except [282] those based on inadequate labels. Finally, FIFRA has no escape clauses like the "grandfathering" and "substantially equivalent" provisions of MDA. The statute and regulations provide that substantially all pesticides are subject to extensive review by the EPA, and the EPA prescribes precise content for pesticide labels....

294 N.J.Super. at 66, 682 A.2d at 731.

The *Lewis* court also expressly rejected the contention that a common-law action imposing damages was not a state "requirement," writing that

> since FIFRA would preempt a state statute or regulation which imposes a monetary penalty on a manufacturer for not using a pesticide label different from that approved by the EPA, FIFRA also preempts a common law rule that would subject a manufacturer to a damage judgment for the same adherence to federal rather than state law.

294 N.J.Super. at 67, 682 A.2d at 732.

The First Circuit reached a similar conclusion in *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir.1996), wherein the plaintiff brought negligence and warranty causes of action against a builder after the plaintiff suffered injuries from the chemicals used to treat the wood. The builder filed a third-party complaint against the manufacturer of the chemical. The manufacturer contended that the actions were preempted by FIFRA. In determining that the third-party plaintiff's claims, as set forth in the complaint, were preempted, the court stated that "[i]t was once an open question, but is now settled by the Supreme Court in *Cipollone* and [*Medtronic, Inc.*], that 'requirements' in this context presumptively includes state causes of action as well as laws and regulations." 96 F.3d at 563. Thus, the court found that because the negligence and warranty actions dealt specifically with labeling-based claims, they were preempted. In so doing, the court was quick to point out that not every misdesign or mismanufacturing claim would be preempted by FIFRA, but, rather, only those that are labeling based.

Despite the strong trend finding preemption before *Medtronic, Inc.* and the adherence to the practice by two courts after *Medtronic, Inc.*, Ackles urges this court to take a different path and hold that his labeling-based strict liability claims are [283] not preempted. In support of this argument, Ackles asserts that in determining whether preemption exists, a court must examine only the language of the pertinent preemption clause, and that there exists a strong presumption against preemption. Because s 136v does not

explicitly state that FIFRA preempts common-law causes of action concerning pesticide labeling, Ackles argues that his claim against Pennwalt should be allowed.

We disagree. If Ackles' labeling-based cause of action against Pennwalt were allowed to proceed and be successful, Pennwalt would be stuck between the proverbial rock and hard place in that it would be required to use the label approved by the EPA, yet pay damages because a jury determined that such label was not sufficient. This result would obviously run contrary to the intentions of Congress in passing FIFRA, namely, that labeling information will be regulated solely by the federal government.

We therefore hold, in accordance with virtually all courts that have ruled on this issue both before and after the U.S. Supreme Court's decision in *Medtronic, Inc.*, that Ackles' labeling-based cause of action against Pennwalt is preempted by FIFRA and that the district court was correct in entering a summary judgment in favor of Pennwalt on that cause of action.

In his remaining assignment of error, Ackles argues that the district court erred in dismissing his failure-to-warn claim alleged in the second cause of action, which was based on a negligence theory, because FIFRA does not preempt such claims.

Ackles' negligence cause of action against Pennwalt is set forth on pages 5 through 7 of the sixth amended petition, containing paragraphs 17 through 28. Paragraph 27 of the petition alleges that Ackles' injuries were a proximate result of Pennwalt's negligence. Subparagraphs a through i list the various manners in which Pennwalt was allegedly negligent. However, pursuant to a district court order dated October 25, 1994, paragraphs 19 through 27 of the sixth amended petition were stricken. No further amended petition was filed.

As a result of the October 25 order, there remain only three paragraphs within the second cause of action, which provide: [284]

> 17. Plaintiff For his Second Cause of Action incorporates paragraphs 1 through 16 of his Introductory Allegations as if fully set forth herein.

> 18. Defendant Pennwalt manufactured, marketed and sold the product known as Penncap-M for use by individuals such as Defendants Brady Coen, Air Care, Inc., Pletcher Flying Service and Richard F. Luttrell.
>
> ....
>
> 28. As a direct and proximate result of the Defendant Pennwalt Corporation, as set forth above, Plaintiff has sustained damages as set forth in paragraph 11, above.

The record does not contain an amended petition after the order of October 25.

In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997); *Olson v. SID No. 177*, 251 Neb. 380, 557 N.W.2d 651 (1997). Obviously, the three remaining paragraphs for Ackles' negligence cause of action fail to plead necessary elements. A bare allegation of proximate cause and damages without providing information as to what negligence occurred fails to set forth a negligence cause of action.

The record before us does not reflect whether Pennwalt's motion for summary judgment also challenged the sufficiency of the pleadings or the failure of the petition to state a cause of action in negligence. We have repeatedly held that a motion for summary judgment is not intended to be used as a substitute for a demurrer or motion for judgment on the pleadings. See *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991). We have, however, held that when it is asserted in a motion for summary judgment that an opposing party has failed to state a cause of action, then the motion may be treated, as to that issue, as one for judgment on the pleadings. See *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993). Unique to the instant case is the fact that Pennwalt has never challenged the sufficiency of Ackles' pleadings regarding the negligence cause of action. We are thus left with a procedural muddle. [285]

A motion for summary judgment is to be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996); *Bogardi v. Bogardi*, 249 Neb. 154, 542 N.W.2d 417 (1996). Because the petition fails to set forth a negligence cause of action in its current form, the entertaining of a motion for summary judgment was inappropriate. See, *Slagle v. J.P. Theisen & Sons*, 251 Neb. 904, --- N.W.2d ---- (1997) (court may not enter summary judgment on issue not presented by pleadings); *Frerichs v. Nebraska Harvestore Sys.*, 226 Neb. 220, 410 N.W.2d 487 (1987). Remaining, however, is the issue of whether the negligence claim can be amended such that it does state a cause of action.

Consequently, we conclude that the district court erred in granting summary judgment on a petition which fails to state a cause of action. We therefore reverse the district court's granting of summary judgment against Pennwalt as it relates to the negligence cause of action and remand the cause with orders that Ackles be given an opportunity to amend his petition. For purposes of remand, we note that, in accordance with the foregoing analysis, a failure-to-warn or labeling-based cause of action is preempted by FIFRA.

CONCLUSION

Through its enactment of FIFRA, Congress has preempted labeling-based common-law causes of action against chemical manufacturers that abide by the regulations of FIFRA. We therefore affirm the summary judgment in favor of Pennwalt regarding Ackles' strict liability cause of action. Because summary judgment was inappropriately entered against Ackles' negligence action, we remand the cause with directions.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

May 14, 1997

J. Marvin Weems
WEEMS LAW FIRM
218 South 16th Street
P.O. Box 170
Ord, NE 68862 0170

IN CASE OF: S-95-0257, Ackles v. Luttrell

Appellant/Motion for Rehearing & Brf **filed** 04/21/97 **has been reviewed by the court and the following order entered:** Motion of appellant for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

IN THE DISTRICT COURT OF
VALLEY COUNTY, NEBRASKA

GARY E. ACKLES, Plaintiff, vs. RICHARD F. LUTTRELL, PLETCHER FLYING SERVICE, INC., A Corporation, n/k/a D & L FLYING SERVICE, INC., A Corporation, BRADY COEN, and PENNWALT CORPORATION, A Foreign Corporation, Defendants.	DOC. 21 PAGE 277 CASE NO. 6277 **JOURNAL ORDER** (Filed Jan. 20, 1995)

In regards to the Motion for Summary Judgment filed by Air Care, Inc. on 10/20/94, said Motion is denied for the reason that there exists a genuine issue of material fact as to whether or not said Defendant had relinquished full control over Mr. Brady Coen (co-Defendant) at the time of the alleged incident at issue.

In regards to the Motions for Summary Judgment of Defendants Richard F. Luttrell and Pletcher Flying Service, Inc., said Motions are denied for the reason that there exists issues of material fact as to whether or not Defendant Mr. Brady Coen was an agent or employee of Pletcher Flying Service, Inc. under the direct supervision of Richard F. Luttrell.

In regards to the Defendant, Pennwalt Corporation, n/k/a Elf Atochem North America, Inc.'s Motion for Summary Judgment, the Court hereby grants said Motion

for the reason that Plaintiff's failure to warn and labeling claims, found in Plaintiff's Causes of Action 2 and 3 of the 6th Amended Petition, present a state law challenge to the EPA-approved Penncap-M label, which challenge is expressly preempted by §136v(b) of the Federal Insecticide Fungicide and Rodenticide Act, 7 U.S. Code §136 et seq.

Furthermore, in light of the above decision, Pennwalt's request for a continuance of trial is now moot and is therefore denied.

WHEREFORE, Defendants Air Care, Inc., Richard F. Luttrell and Pletcher Flying Service, Inc.'s Motions for Summary Judgment are hereby denied. Defendant Pennwalt's Motion for Summary Judgment is hereby granted and Plaintiff's 6th Amended Petition, as to the allegations against Pennwalt, is hereby dismissed with prejudice.

/s/ Ronald D. Olberding
Hon. Ronald D. Olberding
Valley County District
Court Judge

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

(c) Additional uses

(1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator. Such registration shall be deemed registration under section 136a of this title for all purposes of this subchapter, but shall authorize distribution and use only within such State.

(2) A registration issued by a State under this subsection shall not be effective for more than ninety days if disapproved by the Administrator within that period. Prior to disapproval, the Administrator shall, except as provided in paragraph (3) of this subsection, advise the State of the Administrator's intention to disapprove and

the reasons therefor, and provide the State time to respond. The Administrator shall not prohibit or disapprove a registration issued by a State under this subsection (A) on the basis of lack of essentiality of a pesticide or (B) except as provided in paragraph (3) of this subsection, if its composition and use patterns are similar to those of a federally registered pesticide.

(3) In no instance may a State issue a registration for a food or feed use unless there exists a tolerance or exemption under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) that permits the residues of the pesticides on the food or feed. If the Administrator determines that a registration issued by a State is inconsistent with the Federal Food, Drug, and Cosmetic Act, or the use of, a pesticide under a registration issued by a State constitutes an imminent hazard, the Administrator may immediately disapprove the registration.

(4) If the Administrator finds, in accordance with standards set forth in regulations issued under section 136w of this title, that a State is not capable of exercising adequate controls to assure that State registration under this section will be in accord with the purposes of this subchapter or has failed to exercise adequate controls, the Administrator may suspend the authority of the State to register pesticides until such time as the Administrator is satisfied that the State can and will exercise adequate controls. Prior to any such suspension, the Administrator shall advise the State of the Administrator's intention to suspend and the reasons therefor and provide the State time to respond.

June 3, 1996

Pesticide Regulation (PR) NOTICE 96-4

NOTICE TO MANUFACTURERS, PRODUCERS, FORMULATORS, AND REGISTRANTS OF PESTICIDE PRODUCTS

ATTENTION: Persons Responsible for Federal Registration and Reregistration of Pesticide Products

SUBJECT: Label Statements Involving Product Efficacy and Potential for Harm to Property

I. INTRODUCTION

This notice explains EPA procedures in approving pesticide labels that include claims relating to the efficacy of agricultural pesticides and provides a warning to growers regarding reliance on label statements regarding pesticide efficacy. EPA is issuing this notice at this time to correct a misunderstanding regarding the FIFRA label approval process and efficacy claims that is reflected in a series of court decisions concerning the preemptive effect of FIFRA.

II. LEGAL FRAMEWORK

A. Registration and the Label Approval Process

EPA approves pesticide labels in the process of registering a pesticide under FIFRA. FIFRA specifies that EPA shall register a pesticide if:

(1) its composition is such as to warrant the proposed claims for it;

(2) its labeling and other material required to be submitted comply with the requirements of this Act;

(3) it will perform its intended function without unreasonable adverse effects on the environment; and

(4) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. 136c(c)(5). Although the first registration requirement identified above mandates that EPA consider efficacy of label claims, Congress, in 1978, explicitly gave EPA the authority to waive that requirement. FIFRA states:

> In considering an application for the registration of a pesticide, the Administrator may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy.

7 U.S.C. 136c(c)(5). The legislative history explains that Congress believed that product performance issues for agricultural pesticides were adequately addressed by information from government and university sources and market forces:

> This authority [to waive efficacy data] will be used most commonly with respect to agricultural pesticides, due to the high level of

> knowledge concerning pesticidal efficacy that prevails in the agricultural community, the existence of means for communicating efficacy information to users, the organizational expertise of the Department of Agriculture, the extension services, and the universities in this area, and the stake the industry has in marketing products that are efficacious.

S. Rpt. 95-334, 95th Cong., 1st Sess. 20 (July 6, 1977).

EPA has acted under this authority to waive, by regulation, data requirements as to efficacy issues for all agricultural pesticides. 44 Fed. Reg. 27932, 27938 (col. 3) (May 11, 1979); 40 CFR 158.640(b)(1); see also 47 Fed. Reg. 57624 (December 27, 1982). EPA concluded that agriculture pesticides are "effectively regulated by the marketplace," 44 Fed. Reg. 27932, 27938 (col. 3) (May 11, 1979), and that waiving review of the efficacy of agricultural pesticides in the registration process would enable the Agency to focus of its "primary mandate under FIFRA": investigating "the health and safety aspects of pesticides." 47 Fed. Reg. 53192 (November 24, 1982); 47 Fed. Reg. 40659, 40661 (col. 1) (September 15, 1982). EPA pointed to private legal actions for damages as one factor that would ensure that pesticide manufacturers sold an efficacious product: "pesticide producers are aware that they are potentially subject to damage suits by the user community if their products prove ineffective in actual use." 47 Fed. Reg. 40659, 40661 (col. 2) (September 15, 1982).

EPA has also, by regulation, promulgated various requirements pertaining to pesticide labels. These regulations bar the registration of any pesticide with a misbranded label,

40 C.F.R. 152.112(f), and contain specific examples of label statements that are considered false or misleading and thus render a label misbranded. 40 C.F.R. 156.10(a)(5). Additionally, the regulations have requirements for warning statements and mandate that pesticide products have adequate use directions. 40 C.F.R. 156.10(h) and (i).

B. State Preemption Under FIFRA

FIFRA permits states broad authority to regulate pesticides but makes it unlawful for states that undertake such regulation to "impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act." 7 U.S.C. 136v(b). A number of federal court decisions have held that this preemption of state authority as to pesticide labels bars damage claims in state court by growers against pesticide manufacturers. The courts have reasoned that allowing such a claim by a grower would be, in effect, permitting the state to impose label requirements "in addition to or different from" the federally-approved label.

III. LABEL APPROVAL AND PESTICIDAL EFFICACY

There have been several recent preemption decisions involving claims by growers concerning pesticidal efficacy or property damage caused by a pesticide. For example, in Taylor Ag Industries v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995), several growers sued the manufacturers and distributor of a pesticide that the growers alleged had damaged their cotton crop even though they had applied the pesticide according to the label directions. The court

denied the growers' claims on the ground that allowing recovery of damages would interfere indirectly with EPA's "rigorous label-approval process." Id. at 560. In Welchert v. American Cyanamid, Inc., 59 F.3d 69 (8th Cir. 1995), and Worm v. American Cyanamid, Inc. 5 F.3d 744 (4th Cir. 1993), growers sued a pesticide manufacturer seeking recovery for harm to crops allegedly caused when the manufacturer's herbicide remained in the soil and damaged rotated crops. Both courts dismissed the growers' claims noting that EPA's labeling regulations required instructions on rotational crop restrictions. The courts reasoned that to permit such lawsuits "would be to allow state courts to sit, in effect, as super-EPA review boards that could question the adequacy of the EPA's determination of whether a pesticide registrant successfully complied with the specific labeling requirements of its own regulations." Welchert, 59 F.3d at 73; Worm, 5 F.3d at 749.

These court decisions are based on the premise that, in approving labels for agricultural pesticides, EPA examines, or at least has the obligation to examine, the efficacy of the pesticide and related issues such as the potential for the pesticide to cause property damage. The courts, however, have not taken into account the plain language of the statute on this issue and have misinterpreted the thrust of EPA's regulations. As noted above, in actual fact, EPA, with Congress' approval, stopped evaluating pesticide efficacy for routine label approvals almost two decades ago. Further, as explained below, EPA's regulations do not require a review of efficacy of property damage issues for agricultural pesticides.

EPA's labeling regulations must be interpreted in light of the statutory requirements for registration and EPA's waiver of the requirement for efficacy data on agricultural pesticides. Because efficacy data is not reviewed as part of the registration of agricultural pesticides, it would be incorrect to contend that the label approval process involves an examination of the efficacy of the pesticide. Rather, the label approval process is centered on the issue of the whether label, including the specification of use sites and the directions for use on the label, meets the core requirement for registration: that the pesticide not cause "unreasonable adverse effects on the environment." That term is defined as "any unreasonable risk to man or the environment. . . . " 7 U.S.C. 136(bb). Accordingly, the primary focus in the label approval process for agricultural pesticides involves assessing and regulating the potential risks to humans and the environment posed by such pesticides.

To this end, EPA applies the requirements in its labeling regulations with an eye to risk not efficacy issues. This is illustrated by how EPA applies label requirements regarding pesticide use sites and directions for the use of pesticides including directions concerning rotational corps. Label regulations require that pesticide use sites (e.g., specific crops, animals, etc.) be listed on the label because assessment of the dietary risk of pesticides is based on the foods that legally may contain the pesticide, and, under FIFRA, the label establishes the legal limits on use of a pesticide. 7 U.S.C. 136j(a)(2)(G). Use sites are not reviewed as to the pesticide's efficacy for those crops. The label regulations address the directions for use of a

pesticide for the purpose of insuring that pesticide applicators and farmworkers are adequately protected. Additionally, directions for use establish legal limits as to the amounts of pesticide that may be applied and thus allow EPA to control and estimate dietary exposure. EPA does not check to see whether application equipment mentioned in directions for use will be harmed or whether other property damage might occur. For example, the label regulations on directions for use specify that rotation crop restrictions are required when needed "to prevent unreasonable adverse effects upon the environment." 40 C.F.R. 156.10(i)(2)(x). Such restrictions are needed for certain pesticides to prevent uptake of residual pesticide residues from the soil into crops for which the pesticide is not registered. EPA's concern is that the consumption of the rotated crop would increase dietary exposure to the pesticide residue. Rotational crop restrictions are not reviewed to determine if the rotated crop would be injured by the residual pesticide residues.

An additional requirement for registration, noted above, is that the pesticide's labeling comply with the Act. Separately, EPA, by regulation, has required that labeling not be misbranded. 40 C.F.R. 152.112(f). However, these registration requirements should not be read as reintroducing efficacy concerns into the label approval process. Having directly given EPA the authority to disregard efficacy issues, Congress could not have intended that, once EPA exercised this authority, the same efficacy issues would come in through the back door of the label approval process. Under the statute and its regulations, EPA still must determine in registering a pesticide if the pesticide's label complies with FIFRA or is misbranded

but, unless EPA reinstates the requirement to submit efficacy data (either generally or with regard to a particular pesticide), that compliance and misbranding inquiry will generally not extend to the evaluation of the efficacy of the pesticide.

Efficacy and property damage issues are at times relevant to the continued registration of a pesticide. FIFRA's "unreasonable adverse effects" standard requires EPA to take into account "economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. 136(bb). A pesticide's efficacy and its potential to cause property damage are factors to be considered in determining the economic benefit a pesticide provides to farmers. However, in light of EPA's waiver of the efficacy data requirement for initial registration, these issues would generally only arise following the registration of the pesticide, including approval of the pesticide label. For example, if a pesticide manufacturer were to learn that one its registered pesticides was causing property damage, the manufacturer would be obligated to report that information under section 6(a)(2) of the statute. 7 U.S.C. 136c(a)(2). Additionally, if EPA discovers new risk concerns with an already-registered pesticide, it might examine efficacy data with regard to the pesticide in making an evaluation under the unreasonable adverse effects standard to determine if the product's registration should be cancelled or suspended.

IV. CONCLUSION

EPA hopes this Notice will be useful to courts, the regulated community, and pesticide users. EPA believes this Notice should be helpful to courts in preemption cases that involve EPA's labeling regulations. For example, some courts have mistakenly assumed that EPA's labeling regulations concerning the directions for use of a pesticide have an efficacy component. Further, other courts have erroneously concluded that because a pesticide label contained warnings regarding property damage that EPA had necessarily evaluated such warnings and found them to be truthful and adequate. As to registrants and applicants for registration, this Notice is intended to confirm that EPA has not altered its regulation relating to the waiver of efficacy data requirements for the registration of agricultural pesticides. Finally, as to pesticide users this Notice is intended to clarify that EPA's approval of a pesticide label does not reflect any determination on the part of EPA that the pesticide will be efficacious or will not damage crops or cause other property damage.

Daniel M. Barolo
Director, Office of Pesticide
Programs

SUPPLEMENTAL LABEL

[LOGO]

RESTRICTED USE PESTICIDE

Due to very high acute toxicity to humans and birds. For retail sale to and use only by certified applicators or persons under their direct supervision and only for those uses covered by the certified applicator's certification. Direct supervision for this product is defined as the certified applicator being physically present during application, mixing, loading, repair and cleaning of application equipment. Commercial certified applicators must also ensure that all persons involved in these activities are informed of the precautionary statements.

ACCEPTED

FEB 21 1990

Under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, for the pesticide registered under.

EPA Reg. no. 4581-292

PENNCAP-M®
MICROENCAPSULATED INSECTICIDE
(EPA Reg No. 4581-292)

MODIFICATION IN RATE FOR CONTROL OF APHIDS ON WHEAT, OATS AND BARLEY

DIRECTIONS FOR USE

It is a violation of Federal law to use this product in a manner inconsistent with its labeling.

INSECT	PINTS/ACRE	REMARKS
Aphids (including Greenbug)	2-3	Do not apply within 15 days of harvest or grazing

This label and the Federally registered label must be in the possession of the user at the time of pesticide application.

Follow all applicable restrictions, precautions and instructions on the Federally registered label.

(11/89)

Agchem Division • Pennwalt Corporation • 3 Parkway • Philadelphia, Pa. 19102 – (manufacturer's note at bottom of page 1)

RESTRICTED USE PESTICIDE

Due to very high acute toxicity to humans and birds.

For retail sale to and use only by certified applicators or persons under their direct supervision and only for those uses covered by the certified applicator's certification. Direct supervision for this product is defined as the certified applicator being physically present during application, mixing, loading, repair and cleaning of application equipment. Commercial certified applicators must also ensure that all persons involved in these activities are informed of the precautionary statements.

PENNCAP-M

PENNCAP-M

MICROENCAPSULATED INSECTICIDE

ACTIVE INGREDIENTS:

O.O-Dimethyl O-p-nitrophenyl phosphorothioate	20.9%
Related Isomers	1.1%
Xylene Base Aromatic Solvent	4.9%

INERT INGREDIENTS	73.1%
TOTAL	100.0%

Methyl Parathion (Contains 2 pounds Methyl Parathion and Related Isomers per Gallon)
U.S. Patent Nos. 3,429,827, 3,577,515, 3,959,464

KEEP OUT OF REACH OF CHILDREN
AVISO WARNING

PRECAUCION AL USUARIO

Si usted no lee ingles, no use este producto hasta que le etiqueta haya sido explicado ampliamente.

STATEMENT OF PRACTICAL TREATMENT

IF SWALLOWED, induce vomiting immediately by giving two glasses of water and sticking finger down throat. Call a physician. Never give anything by mouth to an unconscious person.

IF ON SKIN, immediately wash with soap and water and flush with plenty of water.

IF IN EYES, immediately flush eyes with plenty of water for at least 15 minutes.

Refer to back panel for Precautionary and First Aid statements and Note to Physician.

[LOGO] PENNWALT
CHEMICALS • EQUIPMENT
HEALTH PRODUCTS

EPA Registration No. 4581-292
EPA Establishment No. 4581-TX-1

Net Contents:___U.S. Gallons/___Liters

Sold by:
AGCHEM DIVISION——PENNWALT CORPORATION
Philadelphia, Pa. 19102

DIRECTIONS FOR USE

It is a violation of Federal Law to use this product in a manner inconsistent with its labeling.

PENNCAP-M is a flowable formulation consisting of water suspension of polymenctype microcapsules which contain methyl parathion. It is applied by air or ground equipment by diluting it with an amount of water suitable for the specific crop and type of spraying equipment. For air application, use at least 2 gallons total spray per acre unless specified otherwise.

First add approximately half of the water to the spray tank, then add the required quantity of PENNCAP-M with good agitation, and finally add the rest of the water. This procedure should be followed to insure proper mixing of PENNICAP-M.

Mixtures of PENNCAP-M with emulsifiable concentrates, organic solvents, or some surfactants may cause increased toxicity and shorter residual effectiveness. This effect is more pronounced with concentrated sprays and extended periods between mixing and application.

DO NOT USE SCREEN OR NOZZLES FINER THAN 50 MESH. STIR OR SHAKE BEFORE USING.

PENNCAP-M will not control organophosphate resistant insects.

WORK SAFETY RULES

The National Pesticide Telecommunication Network is available for recommendations regarding poisoning management, emergency treatment, and other information

regarding the toxicity of methyl parathion. The toll free number for the National Pesticide Telecommunication Network is 1-800-858-7378.

If handled indoors provide mechanical exhaust ventilation. Keep all unprotected persons, children, livestock, and pets away from treated area or where there is danger of drift. Do not rub eyes or mouth with hands. If you feel sick in any way. STOP work and get help right away. See First Aid (Practical Treatment) section on main container label.

HANDLE THE CONCENTRATE ONLY WHEN WEARING THE FOLLOWING PROTECTIVE CLOTHING AND EQUIPMENT: Wear a protective suit of one or two pieces that covers all parts of the body except the head, hands, and feet. Wear chemical resistant gloves, chemical resistant apron, and chemical resistant shoes, shoe coverings, or boots. Wear goggles or a face shield. Wear a pesticide respirator approved by the National Institute for Occupational Safety and Health under the provisions of 30 CFR part II.

USE ONLY WHEN WEARING THE FOLLOWING PROTECTIVE CLOTHING AND EQUIPMENT DURING MIXING, LOADING, APPLICATION REPAIR, AND CLEANING OF APPLICATION EQUIPMENT, DISPOSAL OF PESTICIDE AND EARLY REENTRY INTO TREATED AREAS: protective suit of one or two pieces covering all parts of the body except the head, hands, and feet: chemical resistant gloves; chemical resistant shoes or chemical resistant shoe coverings or chemical resistant boots); goggles or face shield; hood or wide brimmed hat; NIOSH approved respirator.

IF MIXING/LOADING IS PERFORMED USING A CLOSED SYSTEM, THE FOLLOWING PROTECTIVE CLOTHING AND EQUIPMENT MAY BE WORN AS AN ALTERNATIVE: long-sleeve shirt; long-legged pants; chemical resistant gloves; chemical resistant apron; shoes and socks. Goggles or face shield must be worn when the system is under pressure. All other protective clothing and equipment required for use with open systems must be available nearby.

IF APPLICATION IS PERFORMED USING AN ENCLOSED CAB OR COCKPIT, THE FOLLOWING PROTECTIVE CLOTHING AND EQUIPMENT MAY BE WORN AS AN ALTERNATIVE: long-sleeve shirt and long-legged pants; shoes and socks. Chemical resistant gloves must be available in the cab or cockpit and must be worn during entry to and exit from the application vehicle. All other protective clothing and equipment required for use during application must be available in the cab and must be worn when exiting the cab into treated area. When used for this purpose, contaminated clothing may not be brought back into the cab unless in an enclosure such as a plastic bag. REMEMBER – THIS CLOTHING IS INADEQUATE TO PROTECT YOU DURING REPAIR AND CLEANING OF APPLICATION EQUIPMENT AND EARLY REENTRY TO TREATED AREAS! REFER TO PROTECTIVE CLOTHING AND EQUIPMENT REQUIREMENTS ABOVE.

IMPORTANT! If pesticide comes into contact with skin, wash off with soap and water and contact a physician immediately. Always wash hands, face, and arms with soap and water before smoking, eating, drinking, or going to the bathroom.

AFTER WORK: before removing gloves, wash them with soap and water. Take off all work clothes and shoes. Shower using soap and water. Wear only clean clothes when leaving job – do not wear contaminated clothing. Personal clothing worn during work must be stored and laundered separately from protective clothing and household articles. Store protective clothing separately from personal clothing. Clean or launder protective clothing after each use. Respirators must be cleaned and filters replaced according to instructions included with the respirators. Protective clothing and protective equipment heavily contaminated or drenched with methyl parathion must be destroyed according to state and local regulations. HEAVILY CONTAMINATED OR DRENCHED CLOTHING CANNOT BE ADEQUATELY DECONTAMINATED. DURING AERIAL APPLICATION, HUMAN FLAGGERS ARE PROHIBITED.

RE-ENTRY STATEMENT

Do not apply this product in such a manner as to directly or through drift expose workers or other persons. The area being treated must be vacated by unprotected persons.

Reentry into treated fields is prohibited for 48 hours after application, unless all protective clothing and equipment required for early reentry as described under Work Safety Rules are worn.

Written or oral warnings must be given to workers who are expected to be in an area about to be treated with this product. In case of accidental exposure, workers should wash thoroughly with soap and water and contaminated

clothing should be removed and washed before reuse. When oral warnings are given, warnings shall be given in a language customarily understood by workers. Oral warnings shall be given if there is reason to believe that written warnings cannot be understood by workers. Written warnings must include the following information. "WARNING. Area treated with PENNCAP-M™ insecticide on (date of application). Do not enter without appropriate protective clothing within 48 hours after application. In case of accidental exposure, workers should wash thoroughly with soap and water and contaminated clothing should be removed and washed before reuse.

* * *

PRECAUTIONARY STATEMENTS

HAZARDS TO HUMANS (AND DOMESTIC ANIMALS)

MAY BE FATAL IF SWALLOWED. HARMFUL IF ABSORBED THROUGH SKIN OR INHALED.

Wash thoroughly with soap and water after handling and before eating or smoking. Avoid contact with skin, eyes, or clothing. Avoid breathing vapors and spray mist. Remove contaminated clothing and wash before reuse. Use in ventilated areas since accumulation of xylene vapors may be hazardous. Use with adequate ventilation. Avoid prolonged breathing of vapor.

FIRST AID: Call a physician in all cases of suspected poisoning. It is suggested that a suitably equipped local medical facility be identified prior to using this product.

Warning symptoms of organophosphate poisoning include weakness, headache, tightness in chest, blurred vision, non-reactive pin-point pupils, salivation, sweating, nausea, vomiting, diarrhea and abdominal cramps. If these symptoms appear transport the patient immediately to the nearest hospital. Keep patient prone and quiet. Start artificial respiration immediately if patient is not breathing.

Note to Physician: The active ingredient of PENNCAP-M is an organophosphate cholinesterase inhibitor. atropine is antidotal. 2-PAM is also antidotal and may be administered in conjunction with atropine. Morphine is contraindicated.

ENVIRONMENTAL HAZARDS

This pesticide is extremely toxic to aquatic invertebrates and wildlife. Birds in treated areas may be killed. Shrimp and other aquatic organisms may be killed at recommended application rates. Do not apply directly to water or wetlands (swamps, bogs, marshes and potholes). Runoff and drift from target areas may be hazardous to aquatic organisms in adjacent aquatic sites. Do not contaminate water when disposing of equipment washwaters. Do not apply when weather conditions favor drift or runoff from target areas.

THIS PRODUCT IS HIGHLY TOXIC TO BEES exposed to direct treatment or residues on crops or blooming weeks. Do not apply this product or allow it to drift to blooming crops or weeds if bees are visiting the areas to be treated. Refer to and follow the more specific and applicable precautions in the directions for certain crops. Protective

information may be obtained from your Cooperative Extension Service.

STORAGE AND DISPOSAL

Do not contaminate water, food, or feed by storage or disposal.

Storage Instructions: Store in the original container. Do not store in a manner where cross-contamination with other pesticides, fertilizers, food or feed could occur. If spilled during storage or handling, absorb with sand or other inert material and dispose of absorbent in accordance with the Pesticide Disposal Instructions listed below.

Pesticide Disposal Instructions: Pesticide wastes are acutely hazardous. Improper disposal of excess pesticide, spray mixture, or rinsate is a violation of Federal Law. If these wastes cannot be disposed of by use according to label instructions, contact your State Pesticide or Environmental Control Agency, or the Hazardous Waste representative at the nearest EPA Regional Office for guidance.

Container Disposal Instructions: Triple rinse (or equivalent). Then offer for recycling or reconditioning, or puncture and dispose of in a sanitary landfill, or by incineration, or, if allowed by state and local authorities, by burning. If burned, stay out of smoke.

WARRANTY AND DISCLAIMER

Pennwalt Corporation warrants that this material conforms to the chemical description on the label and is

reasonably fit for the purposes referred to in the Directions for Use, subject to the risks referred to therein. PENNWALT MAKES NO OTHER EXPRESS OR IMPLIED WARRANTY OF FITNESS OR MERCHANTABILITY OR ANY OTHER EXPRESS OR IMPLIED WARRANTY. IN NO CASE SHALL PENNWALT OR SELLER BE LIABLE FOR CONSEQUENTIAL, SPECIAL OR INDIRECT DAMAGES RESULTING FROM THE USE OR HANDLING OF THIS PRODUCT INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS, BUSINESS REPUTATION, OR CUSTOMERS; LABOR COST; OR OTHER EXPENSES INCURRED IN PLANTING OR HARVESTING.

Pennwalt and seller offer this product and the buyer and user accept it subject to the foregoing conditions of sale and warranty which may be varied only by agreement in writing signed by a duly authorized representative of Pennwalt.

IN THE DISTRICT COURT OF
VALLEY COUNTY, NEBRASKA

GARY E. ACKLES,	)	CASE NO. 6277
	)	
Plaintiff,	)	
	)	
v.	)	
	)	SIXTH AMENDED
RICHARD F.	)	PETITION AT LAW
LUTTRELL and	)	
PLETCHER	)	
FLYING SERVICE,	)	
INC., A Corporation,	)	
n/k/a	)	
D & L FLYING	)	
SERVICE, INC.,	)	
A Corporation,	)	
BRADY COEN,	)	
AIR CARE, INC.,	)	
A Foreign	)	
Corporation and ELF	)	
ATOCHEM	)	
NORTH AMERICAN,	)	
INC., a	)	
Foreign Corporation	)	
	)	
Defendant.	)	

PLAINTIFF STATES THAT:

Introductory Allegations

1. Plaintiff is a resident of Ord, Valley County, Nebraska.

2. Defendant Richard F. Luttrell is a resident of Greeley County, Nebraska. Defendant Pletcher Flying Service, Inc., is a corporation organized under the laws of the State of Nebraska, with its principal place of business in North Loup, Valley County, Nebraska. Pletcher Flying Service, Inc., is now known as ("n/k/a") D & L Flying

Service, Inc., having changed its corporate name after the events described in Plaintiff's Petition. Defendant Air Care, Inc. is a corporation organized under the laws of the State of Colorado, with its principal place of business in Lamar, Prowers County, Colorado. Defendant Brady Coen is presently a resident of the State of Colorado.

3. Richard F. Luttrell, Brady Coen and Air Care, Inc. were at all times material herein acting within the scope and course of their employment or agency or both with Pletcher Flying Service, Inc., and the acts of negligence of Richard F. Luttrell, Brady Coen and Air Care, Inc. are imputed to Pletcher Flying Service, Inc. under the doctrine of respondeat superior.

4. Defendant Elf Atochem North American, Inc., formerly and hereinafter referred to as "Pennwalt", is a corporation organized in a state other than Nebraska with its principal place of business in Pennsylvania.

5. On August 2, 1991, between 10:45 a.m. and 11:00 a.m., while Plaintiff was delivering mail in Valley County, Nebraska, he became exposed to a pesticide identified as Penncap-M which pesticide was being sprayed on corn in a field adjacent to the road where Plaintiff was delivering mail.

6. Said pesticide was manufactured, marketed and sold by Pennwalt.

7. Upon information and belief, Plaintiff states that the field being sprayed was located within the following legal description:

> The Northeast one-quarter (NE 1/4) of Section 21, Township 18 North, Range 14 West, the 6th PM, in Valley County, Nebraska.

8. Brady Coen on August 2, 1991, was spraying the pesticide described above under the direct supervision and control of the Defendant Richard F. Luttrell. Defendant Richard F. Luttrell on August 2, 1991, was a certified commercial applicator of pesticides having been so certified by the Environmental Protection Agency of the United States of America and held Certification No. NE 591818. On said date Defendant Richard F. Luttrell was President of Pletcher Flying Service, Inc. Sometime before said date, Richard F. Luttrell contracted with Air Care, Inc. for Air Care, Inc. to provide Pletcher Flying Service, Inc. a qualified pilot and plane to

apply aerial spray on the above described real estate on August 2, 1991. Brady Coen was employed by Air Care, Inc. or Pletcher Flying Service, Inc. or both on August 2, 1991.

9. The fumes from the pesticide known as Penncap-M were ingested by Plaintiff and upon Plaintiff ingesting these fumes he became nauseated and ill.

10. On August 4, 1991 Plaintiff was admitted to Good Samaritan Hospital in Kearney Nebraska with an admission diagnosis of "exposure to organophosphate poisoning" and was eventually discharged on August 11, 1991.

11. As a direct and proximate result of the Plaintiff becoming exposed to the pesticide known as Penncap-M, Plaintiff has sustained the following by way of damages:

a. Organophosphate poisoning;
b. Depression and anxiety;
c. Physical pain and mental suffering in the past and it is reasonably certain that Plaintiff will incur physical pain and mental suffering in the future;
d. Medical bills in the past and it is reasonably certain that Plaintiff will sustain medical bills in the future;
e. Loss of wages in the past and it is reasonably certain that Plaintiff will sustain future loss of wages; and,
f. Permanent impairment of Plaintiff's earning capacity.

12. Plaintiff was 52 years of age and had a life expectancy of 23.3 years on August 2, 1991.

13. Plaintiff's wife, Jeanne Ackles, has assigned to Plaintiff in writing all causes of action she may have for medical bills and expenses as a result of this accident, including loss of consortium. That a copy of said Assignment is attached hereto, marked Exhibit "A", and incorporated herein by reference.

First Cause of Action
Negligence as to Brady Coen and Richard F. Luttrell

14. Plaintiff for his First Cause of Action incorporates paragraphs 1 through 13 of Introductory Allegations as if fully set forth herein.

15. The exposure of Plaintiff to the pesticide known as Penncap-M and the resulting illness which Plaintiff incurred were a direct and proximate result of the negligence of Defendants Brady Coen, Air Care, Inc., Pletcher Flying Service and Richard F. Luttrell in each and all the following respects:

AS TO THE DEFENDANT BRADY COEN

a. In failing to ensure that there were no humans, such as Plaintiff, in close proximity to the field where the defendant was spraying on August 2, 1991; and,

b. In failing to spray the field of corn with the pesticide known as Penncap-M in such a manner as to prevent the wind from blowing the pesticide into an area where individuals such as Plaintiff might be situated.

AS TO DEFENDANTS RICHARD F. LUTTRELL, PLETCHER FLYING SERVICE AND AIR CARE, INC.

a. In failing to ensure that there were no humans, such as Plaintiff, in close proximity to the field where the Defendants were spraying on August 2, 1991;

b. In failing to spray the field of corn with the pesticide known as Penncap-M in such a manner as to prevent the wind from blowing the pesticide into an area where individuals such as Plaintiff might be situated;

c. In failing to properly supervise and control Brady Coen while he was spraying the field of corn previously identified in Plaintiff's Petition;

d. In failing to investigate the background of Brady Coen to determine if he had training and/or experience as an aerial pesticide applicator; and

e. In failing to determine whether Brady Coen was duly licensed as a certified aerial pesticide applicator in the State of Nebraska.

16. As a direct and proximate result of the negligence of Defendants Brady Coen, Richard F. Luttrell, Pletcher Flying Service and Air Care, Inc. as set forth above, Plaintiff has sustained damages as set forth in paragraph 11, above.

Second Cause of Action
Negligence as to the Defendant Pennwalt Corporation

17. Plaintiff For his Second Cause of Action incorporates paragraphs 1 through 16 of his Introductory Allegations as if fully set forth herein.

18. Defendant Pennwalt manufactured, marketed and sold the product known as Penncap-M for use by individuals such as Defendants Brady Coen, Air Care, Inc., Pletcher Flying Service and Richard F. Luttrell.

19. Defendant Pennwalt knew, or should have known, the danger involved in the condition of the product, Penncap-M, if the work entrusted to the contractor was not carefully and skillfully done.

20. Defendant Pennwalt, knew, or should have known, the character of the work was not of the kind which a competent contractor is so likely to do properly that it is reasonable to rely entirely or to a certain extent upon the contractor's competence as a sufficient assurance that the work will be safely done.

21. Defendant Pennwalt knew, or should have known, the ability which the employer had or should have to appreciate the proper or improper character of the work done by the contractor.

22. Defendant Pennwalt knew, or should have known, the ease or difficulty of ascertaining the actual character of the completed work.

23. Defendant Pennwalt knew, or should have known, the existence of a relation between the contractor's employer and those injured by the careless or incompetent work of the contractor which entitles them to expect the employer will personally exercise care for their safety.

24. By reason of the nature of the product known as Penncap-M and relationship of the parties, Defendant Pennwalt had a nondelegable duty of ordinary and reasonable care to investigate, warn, train and supervise applicators such as Defendants Brady Coen, Air Care, Inc., Pletcher Flying Service, Inc. and Richard F. Luttrell to maintain the area, surrounding the area in which Plaintiff was driving, in a safe condition free from hazards, defects and dangers.

25. By reason of Defendant Pennwalt's participation in the preparation and design of the product known as Penncap-M Defendant Pennwalt had a nondelegable duty of ordinary and reasonable care to maintain warnings in the area, surrounding the area in which Plaintiff was driving, in a safe condition, free from hazards, defects and dangers.

26. Defendant Pennwalt knew, or should have known, that the failure to maintain and control the application site in a safe condition, free from hazards, defects and dangers, would expose persons, such as Plaintiff, traveling through the site to the unreasonable risk of personal injury.

27. The exposure of Plaintiff to the pesticide known as Penncap-M and the resulting illness which Plaintiff incurred were a direct and proximate result of the negligence of Defendant Pennwalt in each and all the following respects:

a. In failing to effectively train and warn applicators they must ensure that there were no humans, such as Plaintiff, in close proximity to the field where Defendants Pletcher Flying Service, Inc., Richard F. Luttrell, Air Care, Inc. and Brady Coen were spraying on August 2, 1991; and,

b. In failing to effectively train and warn applicators to spray the field of corn with the pesticide known as Penncap-M in such a manner as to prevent the wind from blowing the pesticide into an area where individuals such as Plaintiff might be situated.

c. In failing to properly supervise and control Pletcher Flying Service, Inc., Richard F. Luttrell, Air Care, Inc. and Brady Coen while spraying the field of corn previously identified in Plaintiff's Petition;

d. In failing to investigate the backgrounds of Pletcher Flying Service, Inc., Richard F. Luttrell, Air Care, Inc. and Brady Coen to determine if they had training and/or experience as an aerial pesticide applicator;

e. In failing to determine whether Brady Coen was duly licensed as a certified aerial pesticide applicator in the State of Nebraska;

f. In failing, neglecting and refusing to properly design and carry out application of the product in such a way to protect travelers and, in particular, the Plaintiff, from unreasonable risk of personal injury;

g. In failing, neglecting and refusing to maintain and keep safe the area in which Plaintiff was traveling;

h. In failing, neglecting and refusing to warn and instruct those individuals traveling the road, particularly the Plaintiff, as to the dangers associated with such work being performed;

i. In failing, neglecting and refusing to properly inspect, analyze and, if necessary, correct, the aerial application process, particularly the warning signs and barricades, so as to insure that the road was in a safe condition, free from hazards, defects and dangers.

28. As a direct and proximate result of the Defendant Pennwalt Corporation, as set forth above, Plaintiff has sustained damages as set forth in paragraph 11, above.

Third Cause of Action
Strict Liability as to the Defendant Pennwalt Corporation

29. Plaintiff for his Third Cause of Action incorporates paragraphs 1 through 28 of his Introductory Allegations as if fully set forth herein.

30. Defendant Pennwalt manufactured, marketed and sold the product known as Penncap-M for use by individuals such as the Defendants Brady Coen, Air Care, Inc., Pletcher Flying Service, Inc. and Richard F. Luttrell.

31. Defendant placed Penncap-M on the market for use and this Defendant knew, or in the exercise of reasonable care should have known, that this product would be used by applicators such as Brady Coen, Air Care, Inc., Pletcher Flying Service, Inc. and Richard F. Luttrell.

32. The product known as Penncap-M was in a defective condition at the time it was placed on the market and left Defendant Pennwalt's possession.

33. The defective condition rendered the Penncap-M unreasonably dangerous.

34. The defects referred to in paragraphs 32 and 33 above, were the following:

a. In failing to adequately and properly warn users of, and other persons who will forseeably be endangered by, the product known as Penncap-M of the toxic nature of the product;

b. In failing to provide written instructions to aerial applicators of the product known as Penncap-M as to the manner in which the product should be applied; and,

c. In placing on the market for use a product which is toxic and creates an unreasonably dangerous condition when human beings such as the Plaintiff become exposed to the product.

35. As a direct and proximate result of the defects set forth in paragraph 34, above, the Plaintiff sustained damages as set forth in paragraph 11, above.

WHEREFORE, Plaintiff prays for judgment on his First Cause of Action against Defendants Air Care, Inc. Brady Coen, Pletcher Flying Service, Inc., n/k/a D & L Flying Service, Inc. and Richard F. Luttrell, for judgment on his Second Cause of Action against Defendant Pennwalt and for judgment on his Third Cause of Action against Defendant Pennwalt for his special damages, general damages as allowed by law, and his costs incurred herein.

GARY E. ACKLES, Plaintiff
By: /s/ J. Marvin Weems
One of Plaintiff's Attorneys
Mandy L. Strigenz, #20208
E. Terry Sibbernsen, #13826
E. TERRY SIBBERNSEN, P.C.
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and
J. Marvin Weems, #14428
J. MARVIN WEEMS, P.C.
218 South 16th Street
P.O. Box 170
Ord, NE 68862-0170
(308) 728-3285

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Sixth Amended Petition At Law was mailed by regular U.S. mail to John O. Sennett, P O Box 326, Broken Bow, NE 68822; Brian D. Nolan, 1905 Harney Street, #800, Omaha, Nebraska 68102; and Brady Coen, c/o Air Care, Inc., P O Box 321, Lamar, Colorado 81052 on the 9th day of September, 1994.

/s/ J. Marvin Weems
J. Marvin Weems

IN THE DISTRICT COURT OF
VALLEY COUNTY, NEBRASKA

GARY E. ACKLES, Plaintiff, vs. RICHARD F. LUTTRELL, PLETCHER FLYING SERVICE, INC., A Corporation, n/k/a/ D & L FLYING SERVICE, INC., A Corporation, BRADY COEN, and PENNWALT CORPORATION, A Foreign Corporation, Defendants.	)	DOC 21 PAGE 277 CASE NO. 6277 AMENDED ANSWER

COMES NOW Defendant, Pennwalt Corporation (n/k/a Elf Atochem North American, Inc.), a Foreign Corporation, by and through its attorney of record, Brian D. Nolan, and states the following in response to the Sixth Amended Petition of the plaintiff:

1. This Defendant is without information to admit or deny Paragraph 1 of Plaintiff's Sixth Amended Petition.

2. This Defendant is without information to admit or deny Paragraph 2 of Plaintiff's Sixth Amended Petition.

3. This Defendant is without information to admit or deny Paragraph 3 of Plaintiff's Sixth Amended Petition.

4. This Defendant admits Paragraph 4 of Plaintiff's Sixth Amended Petition.

5. This Defendant denies Paragraph 5 of Plaintiff's Sixth Amended Petition.

6. This Defendant denies Paragraph 6 of Plaintiff's Sixth Amended Petition.

7. This Defendant denies Paragraph 7 of Plaintiff's Sixth Amended Petition.

8. This Defendant denies Paragraph 8 of Plaintiff's Sixth Amended Petition.

9. This Defendant denies Paragraph 9 of Plaintiff's Sixth Amended Petition.

10. This Defendant admits Paragraph 10 of Plaintiff's Sixth Amended Petition.

11. This Defendant denies Paragraph 11, including all subparts thereto of Plaintiff's Sixth Amended Petition.

12. This Defendant denies Paragraph 12 of Plaintiff's Sixth Amended Petition for lack of information.

13. This Defendant denies Paragraph 13 of Plaintiff's Sixth Amended Petition for lack of information.

14. For response to Paragraph 14 of Plaintiff's Sixth Amended Petition, this Defendant incorporates its responses to Paragraphs 1 through 13 of Plaintiff's introductory allegations as if fully set forth herein.

15. This Defendant denies Paragraph 15 and all subparts of Plaintiff's Sixth Amended Petition

16. This Defendant denies Paragraph 16 of Plaintiff's Sixth Amended Petition.

17. For response to Paragraph 17 of Plaintiff's Sixth Amended Petition, this Defendant incorporates its responses to Paragraphs 1 through 16 of Plaintiff's introductory allegations as if fully set forth herein.

18. This Defendant admits Paragraph 18 of Plaintiff's second cause of action in Plaintiff's Sixth Amended Petition.

19. No response is required as to Paragraph 19 of Plaintiff's Sixth Amended Petition for the reason that same was stricken by prior order of this court.

20. No response is required as to Paragraph 20 of Plaintiff's Sixth Amended Petition for the reason that same was stricken by prior order of this Court.

21. No response is required as to Paragraph 21 of Plaintiff's Sixth Amended Petition for the reason that same was stricken by prior order of this Court.

22. No response is required as to Paragraph 22 of Plaintiff's Sixth Amended Petition for the reason that same was stricken by prior order of this Court.

23. No response is required as to Paragraph 23 of Plaintiff's Sixth Amended Petition for the reason that same was stricken by prior order of this Court.

24. No response is required as to Paragraph 24 of Plaintiff's Sixth Amended Petition for the reason that same was stricken by prior order of this Court.

25. No response is required as to Paragraph 25 of Plaintiff's Sixth Amended Petition for the reason that same was stricken by prior order of this Court.

26. No response is required as to Paragraph 26 of Plaintiff's Sixth Amended Petition for the reason that same was stricken by prior order of this Court.

27. No response is required as to Paragraph 27 of Plaintiff's Sixth Amended Petition for the reason that same was stricken by prior order of this Court.

28. This Defendant denies Paragraph 28 of Plaintiff's Sixth Amended Petition.

29. For response to Paragraph 28 of Plaintiff's Sixth Amended Petition, this Defendant incorporates its responses to Paragraphs 1 through 13 of Plaintiff's introductory allegations as if fully set forth herein.

30. This Defendant admits Paragraph 30 of Plaintiff's Sixth Amended Petition.

31. This Defendant admits Paragraph 31 of Plaintiff's Sixth Amended Petition.

32. This Defendant denies Paragraph 32 of Plaintiff's Sixth Amended Petition.

33. This Defendant denies Paragraph 33 of Plaintiff's Sixth Amended Petition.

34. This Defendant denies Paragraph 34 of all subparts of Plaintiff's Sixth Amended Petition.

35. This Defendant denies Paragraph 35 of Plaintiff's Sixth Amended Petition.

AFFIRMATIVE DEFENSES

This Defendant states the following as affirmative defenses to the Plaintiff's Sixth Amended Petition:

A. **Misuse:**

This Defendant affirmatively alleges that the pesticide product at issue was misused in its application. This misuse being unforeseeable, this Defendant cannot be found liable for any resultant injuries in relation to the use of the pesticide product.

B. **Superseding Cause:**

This Defendant affirmatively alleges that the acts of third parties intervened, preventing any actions on behalf of this Defendant from causing, in any way, harm to the Plaintiff, in that the co-Defendants misused the product manufactured by this Defendant thus rendering this Defendant not liable for any resultant injuries in relation to the pesticide product at issue.

C. **Intervening Cause:**

This Defendant affirmatively alleges that an intervening force actively operated to produce harm to the Plaintiff in that the Plaintiff was exposed to the pesticide manufactured by this Defendant because of misuse on behalf of co-Defendants in their application and therefore this Defendant cannot be found liable for any resultant injuries in relation to the use of this pesticide.

D. **Preemption:**

Plaintiff's alleged cause of action against this Defendant is preempted by the provisions of the Federal Insecticide, Fungicide and Rodenticide Act, § 24(a,b), as amended 7 U.S.C.A. § 136v(a, b).

E. **State of the Art:**

This Defendant affirmatively alleges that the product it manufactured, identified as Penncap-M, and referred to in Plaintiff's Sixth Amended Petition represented the state of the art for such products, thereby barring the Plaintiff's action.

F. **Idiosyncratic Reaction:**

This Defendant affirmatively alleges that in the event that Plaintiff is found to have been exposed to this Defendant's product, which exposure is expressly denied, that any reaction that Plaintiff has was an Idiosyncratic Reaction, and does not indicate or in any manner suggest that the Plaintiff's product was unreasonably dangerous.

WHEREFORE, this Defendant prays that Plaintiff's Sixth Amended Petition be dismissed with prejudice at Plaintiff's cost and that this Defendant be allowed to recover its costs expended herein.

PENNWALT CORPORATION, A Foreign Corporation, Defendant

By: /s/ Brian D. Nolan

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800 Exchange Building
1905 Harney Street
Omaha, Nebraska 68102
(402) 348-0900
Brian D. Nolan, #17764

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of October, 1994, the above and foregoing was served by regular United States mail, postage prepaid upon the following:

E. Terry Sibbernsen, #13826
E. TERRY SIBBERNSEN, P.C.
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Ord, NE 68862-0310

/s/ Illegible

Supreme Court, U.S.
FILED
SEP 5 1997
CLERK

No. 97-226

In The

Supreme Court of the United States

October Term, 1996

GARY E. ACKLES,

Petitioner,

v.

RICHARD F. LUTTRELL AND PLETCHER FLYING SERVICE, INC., A CORPORATION, N/K/A D&L FLYING SERVICE, INC., A CORPORATION; BRADY COEN; AIR CARE, INC., A FOREIGN CORPORATION AND ELF ATOCHEM NORTH AMERICA, INC., A FOREIGN CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court For The State Of Nebraska

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Nebraska Supreme Court correctly held that the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") preempts state common law claims that challenge the adequacy of a manufacturer's EPA-approved pesticide label.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, respondent Elf Atochem North America, Inc. states that it has the following parent companies and nonwholly owned subsidiaries or affiliates:

Elf Aquitaine
Elf Aquitaine, Inc.
Elf Atochem S.A.
Reserveco Inc.
Anning Decco Fine Chemical Company, Ltd.
Metco North America, Inc.
Derivados Metalorganicos "DEMOSA"
Elf Atochem Colombia
Elf Atochem Italia
Elf Atochem North Europe
Nitto Kasei Company Ltd.
Safepack Products Ltd.
Safepack Services Ltd.
Elf Atochem Japan Ltd.
Atochem Yoshitomi Ltd.
Elf Atochem Agri S.A.
Elf Atochem Brasil S.A.
Elf Atochem Verwaltungs
Japan Thiochemical Co.
Desarrollo Quimico Indus.
Quimica Pennwalt SA de CV
Pennwalt, S.A. de C.V.
Elf Atochem North Europe
Industrias Clorotec
Petroquimica PWT SA de CV
Cloro de Tehuantepec
Servicios Corporativos
Union Minera del Sur
Pennwalt, S.A. de C.V.
Elf Atochem Colombia
Turco Nederland B.V.
Turco Products Limited

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BRIEF FOR THE RESPONDENT IN OPPOSITION

As a threshold matter, the Nebraska Supreme Court decision from which Petitioner Gary E. Ackles ("Petitioner") seeks review is not final. The Nebraska court remanded this case to the state district court to permit Petitioner to amend his negligence claim. He has done so, and those claims remain unlitigated. This matter therefore is not final and is not ripe for this Court's consideration.

Even if further review by this Court were procedurally proper, Petitioner offers no sound substantive ground for this Court to hear the case. Notably absent from the Petition is any hint of confusion in the lower courts. Indeed, as the Nebraska Supreme Court recognized, "every federal court of appeals that has addressed the issue before us has, in the wake of the *Cipollone* decision, held that both failure-to-warn and labeling-based claims brought under common-law causes of action against manufacturers of pesticides are preempted" by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.* (Appendix to Petition at 1a, p. 7). Given this uniform interpretation of FIFRA, Respondent Elf Atochem North America, Inc. ("Elf Atochem") respectfully submits that there is simply no reason for this Court to grant the writ and hear this case. Indeed, Petitioner does not even attempt to distinguish this case from *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), in which this Court held that a preemption clause virtually identical to FIFRA's expressly preempted state common law labeling claims. Despite the Nebraska Supreme Court's repeated reliance on *Cipollone* in its

decision, Petitioner's "Reasons for Granting the Writ" does not even mention the case.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS NOT FINAL AND THIS CASE IS CONTINUING IN THE NEBRASKA STATE COURT.

This Court should decline to hear this case because the proceedings below are not complete, and review of the case at this point in the litigation would generate piecemeal federal review of state court decisions. The Nebraska Supreme Court's decision does not meet this Court's requirements for finality because the decision does not dispose of Petitioner's action in its entirety. Indeed, Petitioner is even now litigating in state court in Nebraska some of the very issues that Petitioner seeks to present to this Court.

A brief procedural history may be helpful. At the time Elf Atochem brought its motion for summary judgment, Petitioner's complaint asserted theories of negligence and strict liability against Elf Atochem. Elf Atochem moved for summary judgment on both theories, and the district court granted the motion, finding that FIFRA preempted both causes of action. Petitioner appealed.

The Nebraska Supreme Court affirmed the district court's grant of summary judgment on Petitioner's strict liability claim based on FIFRA preemption. On the negligence claim, the court reversed the grant of summary

judgment and remanded the case to the district court to give Petitioner an opportunity to clarify his negligence claim by amendment. The court noted, however, that FIFRA would preempt any allegation based on negligent labeling. (Petition, Appendix at 1a).

On remand, Petitioner filed with the state district court his Seventh Amended Petition, which amended his negligence claim and asserted a brand new breach of implied warranty cause of action. (Appendix at App. 3-4, *infra*). Elf Atochem believes FIFRA also preempts the claims Petitioner asserts in his Seventh Amended Petition, and expects to litigate that issue in the Nebraska courts. Thus, not even the FIFRA issues in this case are final, much less the action as a whole.

This Court's review of state court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257. This Court has held that, except in unusual circumstances not present here,[1] a state court judgment is not "final" for purposes of § 1257 if the state's highest court has remanded the case for further proceedings, unless that remand is for ministerial purposes only. *See Minnick v. California Dep't of Corrections*, 452 U.S. 105, 120-27 (1981); *Flynt v. Ohio*, 451 U.S. 619, 621-22 (1981), *see also Collins v. Miller*, 252 U.S. 364, 370 (1920) (an appealable judgment "should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved"). Moreover, this Court has

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[1] *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-85 (1975).

repeatedly held that a decision lacks finality where a state's highest court has remanded with directions that the parties may amend their pleadings. *See Missouri & Kansas R. Co. v. Olathe*, 222 U.S. 185 (1911); *Clark v. Kansas City*, 172 U.S. 334 (1899); *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608 (1892); *McComb v. County Commissioners*, 91 U.S. 1 (1876).

The remand here is anything but ministerial. The Nebraska Supreme Court remanded Petitioner's action to give him an entirely fresh start on his negligence claim by permitting him to amend his petition to state new allegations, and he has in fact done so. The future of Petitioner's new claims is uncertain; Elf Atochem may be entitled to summary judgment on Petitioner's new claims based on FIFRA preemption or some other ground, or the Nebraska courts may determine that Petitioner is entitled to a trial on the merits on the new claims. Only after the Nebraska courts resolve the new claims asserted in Petitioner's Seventh Amended Petition would a petition for certiorari in this Court be procedurally appropriate.

In sum, the petition before this Court seeks review of a decision that is not final, and this Court should deny review on that ground.

II. THERE IS NO CONFLICT IN THE LOWER COURTS.

Even if the Nebraska decision were final and further review by this Court were procedurally proper, review by this Court is unnecessary in light of the absence of any conflict in the lower federal courts or, for that matter, the

state appellate courts. Since this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), all eight United States Courts of Appeals to consider the precise issue framed by Petitioner have concluded, like the Nebraska Supreme Court, that FIFRA expressly preempts state label-based claims. *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559, 563 (1st Cir. 1996); *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69, 71 (8th Cir. 1995); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Worm v. American Cyanamid Co.* ["*Worm II*"], 5 F.3d 744, 749 (4th Cir. 1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Papas v. Upjohn Co.* ["*Papas II*"], 985 F.2d 516, 520 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.* ["*Arkansas-Platte II*"], 981 F.2d 1177, 1179 (10th Cir.), *cert. denied*, 510 U.S. 813 (1993). No federal appellate court has held to the contrary, and appellate courts in twenty states have reached the same conclusion.[2] Again, no state

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[2] In addition to the decision below, *see Barnes v. Sandoz Crop Protection Corp.*, 938 P.2d 95 (Ariz. App. Div. 1997), *review granted* (Ariz. June 24, 1997); *Buddington v. Sterling Winthrop, Inc.*, 1996 Conn. Super. LEXIS 2402 (Conn. Super. Ct. 1996); *Schuver v. E. I. DuPont de Nemours & Co.*, 546 N.W.2d 610 (Iowa), *cert. denied*, ___ U.S. ___, 117 S. Ct. 274, 136 L. Ed. 2d 197 (1996); *Lewis v. American Cyanamid Co.*, 682 A.2d 724 (N.J. Super. Ct. App. Div. 1996), *certif. granted* (N.J. July 11, 1997); *Babalola v. Chrystal Chems., Inc.*, 644 N.Y.S.2d 1 (N.Y. App. Div. 1996); *Eide v. E. I. DuPont de Nemours & Co.*, 542 N.W.2d 769 (S.D. 1996); *Hopkins v. American Cyanamid Co.*, 666 So.2d 615, 619 (La. 1996); *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819, 820 (Tex. 1995); *Louisiana-Pacific Corp. v. Koppers Co.*, 32 Cal. App. 4th 599, 38 Cal. Rptr. 2d 257 (Cal. Ct. App. 1995); *Malone v. American Cyanamid Co.*, 649 N.E.2d 493 (Ill. Ct. App.), *appeal denied*, 657

appellate court decision stands for the opposite proposition. Moreover, despite Petitioner's argument that this Court's decision last term in *Medtronic, Inc. v. Lohr*, ___ U.S. ___, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996), compels a different result (Petition at 13-14), the unanimity among the courts deciding this issue has continued since *Medtronic*. *See* cases cited in Note 6 *infra*.

In sum, despite Petitioner's effort to create one, there is no "muddle" in the law, and no reason for this Court to hear this case.

III. THE NEBRASKA SUPREME COURT CORRECTLY HELD THAT FIFRA EXPRESSLY PREEMPTS PETITIONER'S COMMON LAW LABELING CLAIM.

Both the language of the FIFRA preemption clause and this Court's precedents fully justify the decisions of these eight federal and 20 state appellate courts upholding preemption. FIFRA's preemption clause is virtually

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N.E.2d 624 (Ill. 1995); *Hochberg v. Zoecon Corp.*, 657 N.E.2d 1263 (Mass. 1995); *Wadlington v. Miles, Inc.*, 922 S.W.2d 520 (Tenn. Ct. App. 1995), *appeal denied* (Tenn. Mar. 25, 1996); *Hue v. Farmboy Spray Co.*, 896 P.2d 682 (Wash. 1995); *Jenkins v. Amchem Prods., Inc.*, 886 P.2d 869 (Kan. 1994), *cert. denied*, ___ U.S. ___, 116 S. Ct. 80, 133 L. Ed. 2d 38 (1995); *Brennan v. Dow Chem. Co.*, 613 So.2d 131, 132 (Fla. 4th Dist. Ct. App. 1993); *ICI Americas, Inc. v. Banks*, 440 S.E.2d 38 (Ga. Ct. App. 1993), *aff'd in relevant part*, 450 S.E.2d 671 (Ga. 1994); *Moody v. Chevron Chem. Co.*, 505 N.W.2d 900, 903 (Mich. Ct. App. 1993), *appeal denied*, 525 N.W.2d 450 (Mich. 1994); *Hopkins v. Ciba-Geigy Corp.*, 432 S.E.2d 142, 146 (N.C. Ct. App. 1993); *Yowell v. Chevron Chem. Co.*, 836 S.W.2d 62, 66 (Mo. Ct. App. 1992); *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931, 937-938 (Nev. 1992), *cert. denied*, 507 U.S. 1051 (1993).

identical to the clause this Court addressed in *Cipollone*, where the Court held that the clause revealed Congress's clear intention to preempt label-based common law claims. This conclusion is confirmed by examination of this Court's earlier opinion in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991) and its subsequent decision in *Medtronic, Inc. v. Lohr*, ___ U.S. ___, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996).

A. FIFRA GIVES EPA EXCLUSIVE AUTHORITY TO REGULATE PESTICIDE LABELING.

To allow the Environmental Protection Agency ("EPA") to carry out the goals of FIFRA, Congress vested in EPA the exclusive authority to regulate the content of pesticide labels.[3] In its exercise of this authority, EPA has established a comprehensive regulatory scheme to ensure the proper content of pesticide labels. Before a pesticide may be sold in the United States, it must be registered and its labeling approved by EPA. 7 U.S.C. § 136a(a). To secure registration, an applicant must submit proposed "labeling" for the product to EPA. 7 U.S.C. § 136a(c)(1)(C). "Labeling" includes not only the written or graphic matter attached to the container itself, but also all written, printed, or graphic matter accompanying the

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[3] When Congress passed FIFRA in 1947, it "was primarily a licensing and labeling statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). Although amendments added in 1972 broadened its scope, FIFRA maintained its sharpest focus on labeling. Indeed, "[t]he 1972 amendments significantly strengthened FIFRA's registration and labeling standards." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 600 (1991).

container or to which reference is made on the attached label. 7 U.S.C. § 136(p).[4] EPA has promulgated detailed regulations specifying the scope, content, wording, and format of pesticide labeling. *See* 40 C.F.R. § 156.

Under FIFRA, it is unlawful for any person, including a manufacturer, to alter this approved labeling in any way without EPA's prior approval. *See* 7 U.S.C. § 136j(a)(2)(A). As a result, pesticide manufacturers are not free to add additional warnings on their own after a particular label has been approved. EPA's regulations require that any proposed labeling change requiring consideration of scientific data (such as additions or modifications of a warning or precaution) must be reviewed and approved by EPA in advance. *See* 40 C.F.R. § 152.81(b)(4). After reviewing the proposed labeling change and the supporting data, EPA may approve the labeling change as proposed, approve it on the condition that the manufacturer use different wording as specified by EPA, or reject it.

Applicants for pesticide registration must also submit the results of extensive scientific testing regarding the performance and the health and environmental safety of the pesticide formulation. 7 U.S.C. § 136a(c)(1)(D), (c)(2); 40 C.F.R. § 158.20. An applicant must conduct acceptable tests in accordance with the Pesticide Assessment Guidelines, guidelines that include, among other things, an

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[4] In addition, case law has interpreted the definition of label to include all explanatory brochures, advertising and promotional literature. *See, e.g., Select Pork, Inc. v. Babcock Swine, Inc.*, 640 F.2d 147 (8th Cir. 1981); *Larson v. Meckling Fertilizer Co.*, 243 N.W.2d 167 (S.D. 1976).

assessment of (1) product composition, (2) residue chemistry, (3) environmental effects, (4) potential hazards to humans, domestic animals and non-target organisms, (5) reentry protection, (6) pesticide spray drift evaluation and (7) product performance. 40 C.F.R. §§ 158.108 (chart and corresponding regulation sections), 158.202.

Finally, under FIFRA, EPA may not register a pesticide or approve its labeling unless the agency finds that the pesticide meets all of the following criteria:

> (a) its composition is such as to warrant the proposed claims for it;
>
> (b) its labeling and other material required to be submitted comply with the requirements of the Act;
>
> (c) it will perform its intended function without unreasonable adverse effects on the environment; and
>
> (d) when used in accordance with widespread and commonly recognized practice, it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. § 136a(c)(5). In registering Penncap-M and approving its labeling, EPA necessarily concluded that Penncap-M, its testing, and the labeling accompanying it were reasonable and appropriate when the product was used in accordance "with widespread and commonly recognized practice." *Id.*

FIFRA and, through its authority, EPA, thus provide comprehensive and exclusive regulation of the labeling of pesticides in the United States.

B. FIFRA'S PREEMPTION CLAUSE EXPRESSLY PROHIBITS STATE-IMPOSED LABELING REQUIREMENTS.

Under the analysis this Court laid down in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), such a comprehensive and exclusive federal regulation of pesticide labeling necessarily preempts any state-imposed labeling requirements on pesticides. The doctrine of federal preemption stems from the Supremacy Clause of the United States Constitution, which provides that the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const., art. VI, cl. 2. "[S]tate law that conflicts with federal law is 'without effect.' " *Cipollone*, 505 U.S. at 516 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). In *Medtronic, Inc. v. Lohr*, ___ U.S. ___, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996), this Court reaffirmed its long-held position that " ' "[t]he purpose of Congress is the ultimate touchstone' " of pre-emption analysis." 116 S. Ct. at 2250 (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)); *see also Cipollone*, 505 U.S. at 516.

As the appellate courts that have considered this issue have recognized, this Court's *Cipollone* decision is controlling of the preemption issue under FIFRA. In *Cipollone*, this Court interpreted the preemption clause in the Public Health Cigarette Smoking Act of 1969 ("PHCSA"), which read:

> (b) No *requirement* or prohibition based on smoking and health shall be imposed under State law with respect to the *advertising or promotion* of any cigarettes the packages of which

> are *labeled* in conformity with the provisions of this Act.

505 U.S. at 515 (quoting § 5(b) of PHCSA) (emphases added). The Court held that this language compelled preemption of state common-law labeling claims. *Cipollone*, 505 U.S. at 521-25.

Like the PHCSA, FIFRA clearly demonstrates that Congress intended to preempt state common-law claims premised on allegedly inadequate pesticide labeling. Indeed, when it passed FIFRA, Congress specified the precise extent to which the States may regulate pesticides. In § 136v of FIFRA, entitled "Authority of States," Congress allowed the states to regulate the sale or use of EPA-registered pesticides (§ 136v(a)), but expressly prohibited any state from establishing independent labeling or packaging requirements (§ 136v(b)):

> § 136v Authority of States
>
> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any *requirements* for *labeling or packaging* in addition to or different from those required under this subchapter.

7 U.S.C. § 136v (emphasis added).

Comparison of the PHCSA and FIFRA clauses makes clear their substantive similarity. Both preemption clauses command the displacement of state "requirements" with respect to labeling that has been approved in accordance with the respective statutes. The lower appellate courts cited above have carefully compared these two preemption clauses and have uniformly concluded that they are substantively indistinguishable. As the United States Court of Appeals for the Seventh Circuit noted, "[n]ot even the most dedicated hair-splitter could distinguish" the preemption clause of FIFRA from that of the PHCSA. *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993).

The Petition before this Court utterly fails to account for the *Cipollone* decision and its impact on FIFRA preemption. Petitioner does not suggest that this Court should overrule *Cipollone*, the basic principles of which this Court reaffirmed just last term in *Medtronic*, nor does he propose any distinction between the preemption clauses of FIFRA and the PHCSA that would suggest a result different than in *Cipollone*. Instead, Petitioner ignores the *Cipollone* case entirely; indeed, the *Cipollone* citation does not even appear in Petitioner's Table of Authorities. Elf Atochem respectfully submits that Petitioner's failure even to mention *Cipollone* in its Reasons for Granting the Writ, notwithstanding the Nebraska Supreme Court's repeated citation of the case as controlling, severely undercuts Petitioner's suggestion that this case presents an issue justifying this Court's review.

The precedents of this Court to which Petitioner does cite do not sustain Petitioner's reading of them. Petitioner's citation to this Court's decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), is puzzling

because *Mortier* supports, rather than undermines, the Nebraska Supreme Court's conclusion. In *Mortier*, this Court held that FIFRA did not preempt a town ordinance regulating the use of pesticides within the town's borders. The ordinance at issue in *Mortier*, however, did not deal with labeling or warning issues; it required a permit for the *application* of pesticides, and imposed standards for evaluating applicants for such permits. The *Mortier* plaintiff, whose application for a permit was denied, claimed that the ordinance was preempted because FIFRA occupied the entire field of pesticide regulation.[5]

In holding that FIFRA did not preempt the entire field of pesticide regulation, the *Mortier* Court considered the language of § 136v(b) of FIFRA, quoted above. This Court recognized that § 136v(b)'s careful language concerning preemption of *labeling* would be "pure surplusage" if, as plaintiff argued, FIFRA occupied the *entire field* of pesticide regulation. *Mortier*, 501 U.S. at 614. The Court concluded:

> Whatever else FIFRA may supplant, it does not occupy the field of pesticide regulation in general or the area of local use permitting in particular.

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[5] Petitioner announces that "*Mortier* is significant because it means this court has already specifically held field preemption cannot be inferred from FIFRA." (Petition at 12). On the contrary, *field* preemption has no bearing on this case. Neither Elf Atochem, the Nebraska Supreme Court, nor any of the legion of other courts concluding that FIFRA preempts labeling claims has relied upon the doctrine of implied preemption, much less field preemption, a subcategory of implied preemption. The present case involves Congress *expressly* preempting state regulation of pesticide labeling.

Id. The Court thus used Congress' specific statement that FIFRA supplanted state pesticide *labeling* regulation as evidence that Congress did not intend FIFRA to replace *all* state pesticide regulation. The Seventh Circuit recognized this point, concluding that "[t]he Supreme Court recently noted the absolutist nature of FIFRA's pre-emption in the labeling and packaging context even as it held that FIFRA does not pre-empt generalized state regulation of pesticides." *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 370 (7th Cir. 1993) (citing *Mortier*).

Likewise, Petitioner's reliance on *Medtronic, Inc. v. Lohr*, ___ U.S. ___, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) is misplaced. As courts interpreting FIFRA since *Medtronic* have concluded, FIFRA's preemption of labeling claims much more similar to the preemption this Court found in *Cipollone* than the preemption it rejected in *Medtronic*. As a result, courts since *Medtronic* have uniformly continued to find *Cipollone* controlling and have correctly continued to uphold FIFRA preemption of state common-law labeling claims.

The conspicuous difference between FIFRA preemption and the preemption rejected by the *Medtronic* Court is in the level of scrutiny demanded by the respective statutory schemes of the subject product. In *Medtronic*, a case interpreting the Medical Device Amendments ("MDA"), the Court relied heavily on the fact that the Food and Drug Administration ("FDA"), the agency charged with applying the MDA, barely reviewed the pacemaker at issue, and that the FDA did not even consider the safety of the device. *Medtronic*, 116 S. Ct. at 2254.

This Court recognized that the MDA's § 510k "substantially equivalent" approval process "requires little information, rarely elicits a negative response from the FDA, and gets processed very quickly." *Id.* at 2247 (citation omitted). The *Medtronic* plurality opinion suggested that in the event of a more thorough agency review, a different result would obtain:

> The generality of [federal labeling and manufacturing] requirements make this quite unlike a case in which the Federal Government has weighed the competing interests relevant to the particular requirement in question, reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case or set of cases, and implemented that conclusion via a specific mandate on manufacturers or producers.

Id. at 2258.

Such a review – in which the responsible agency "weighed the competing interests" and "reached an unambiguous conclusion about how those competing considerations should be resolved" – is exactly what occurred here. In striking contrast to the FDA's cursory § 510k review, FIFRA requires EPA to thoroughly examine each pesticide and its label, and to specifically consider safety and warning issues, before allowing the pesticide to be registered and marketed. In light of this requirement, Petitioner here does not dispute that the EPA carefully considered the safety of Penncap-M and the adequacy of the safety-related warnings on its label before approving them for the market. As a consequence, the *Medtronic* Court's concern with the cursory nature of

the MDA's § 510k approval process simply has no application here. Consistent with this analysis, all 13 courts that have considered this issue since *Medtronic* have continued the pre-*Medtronic* line of cases and have held that FIFRA preempts labeling-based state common law claims.[6]

Also unavailing is Petitioner's citation to the EPA's Pesticide Regulation Notice 96-4 ("PR Notice 96-4"). Even assuming the dubious proposition that such a notice could somehow alter the statute's clear mandate of preemption, PR Notice 96-4 is entirely consistent with preemption in this case. Indeed, PR Notice 96-4 provides that "the primary focus in [FIFRA's] label approval process for agricultural pesticides involves assessing and regulating the potential risks to humans and the environment posed by such pesticides." (Petition at 5a, p. 6). Petitioner's claims against Elf Atochem rest upon his allegation that

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[6] *See Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559, 562-63 (1st Cir. 1996); *Hawkins v. Leslie's Poolmart*, 965 F. Supp. 566 (D.N.J. 1997); *Deshotel v. Rhone-Poulenc, Inc.*, 1997 WL 400780 (W.D. La. March 31, 1997); *Koch v. Shell Oil Co.*, 173 F.R.D. 288 (D. Kan. 1997); *Kuiper v. American Cyanamid Co.*, 960 F. Supp. 1378 (E.D. Wis. Feb. 24, 1997); *Cuevas v. E.I. DuPont de Nemours & Co.*, 956 F. Supp. 1306 (S.D. Miss. 1997); *DeAngelis v. E.I. duPont de Nemours & Co.*, 1996 WL 510092 (E.D. Pa. Sept. 5, 1996); *Didier v. Drexel Chem. Co.*, 938 P.2d 364 (Wash. Ct. App. 1997); *People v. Cotter & Co.*, 53 Cal. App. 4th 1373, 62 Cal. Rptr. 2d 368 (Cal. Ct. App. 1997); *Barnes v. Sandoz Crop Protection Corp.*, 938 P.2d 95 (Ariz. App. Div. 1997), *review granted* (Ariz. June 24, 1997); *Lewis v. American Cyanamid Co.*, 682 A.2d 724 (N.J. App. Div. 1996), *certif. granted* (N.J. July 11, 1997); *Buddington v. Sterling Winthrop, Inc.*, 1996 WL 532484, 1996 Conn. Super. LEXIS 2402 (Conn. Super. Ct. Sept. 10, 1996); *Mann v. H.W. Andersen Prods., Inc.*, 231 A.D. 500, 647 N.Y.S.2d 101 (N.Y. App. Div. 1996).

the label of Penncap-M was inadequate to protect human health. As PR Notice 96-4 recognizes, however, the EPA has already considered the safety of Penncap-M to humans and specifically approved the Penncap-M label as containing warnings adequate to protect human health.[7]

Petitioner's attempt to generate an issue for this Court through its invocation of *Chemical Specialties Manufacturers Ass'n v. Allenby*, 958 F.2d 941 (9th Cir.), *cert. denied*, 506 U.S. 825 (1992) also misfires. *Allenby* was not a tort case at all; it involved a facial challenge to California's Proposition 65, which required that pesticide sellers (among others) provide "warnings" concerning their products through any of several methods, including labeling, point-of-sale information, mailings, media notices, "and the like." *Id.* at 944. Because the challenge was to the proposition *on its face*, the plaintiff needed to demonstrate that "no set of circumstances exists under which the [proposition] would be valid." *Id.* at 943 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

The Ninth Circuit held that, because the proposition allowed compliance through means that would have no effect on the labels required by FIFRA, FIFRA therefore did not preempt that statutory warning requirement. 958 F.2d at 944-48. The Ninth Circuit noted that "there would be no need for companies to change their labels to comply with Proposition 65, *unlike the need to change labels in order to avoid state tort liability*. *Id.* at 948 (emphasis

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[7] Moreover, Petitioner never raised this issue until the Petition. Therefore, Petitioner's argument is not properly before this Court.

added). Thus, the court specifically distinguished between a statute such as Proposition 65, under which a manufacturer could comply without altering its label, and a tort suit such as Petitioner's, in which it could not.

Although the *Allenby* court did not need to reach the issue, it nevertheless recognized the argument for pre-emption of such common-law label-based tort actions as a "strong" one:

> Since FIFRA expressly preempts additional state labeling requirements, the tort suits could circumvent the preemption clause by effectively requiring additional labeling to avoid tort liability even though the states do not expressly require the additional labeling.

Id. When the Ninth Circuit *did* reach the issue in 1995, the court very clearly distinguished *Allenby* and held that FIFRA preempts *all* state tort labeling actions. *Taylor AG*, 54 F.3d at 561 n.2.[8]

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[8] Petitioner cites two older decisions for the proposition that FIFRA's preemption clause does not mean what it says when someone other than the purchaser or user alleges injury. (Petition at 16-18, citing *Macrie v. SDS Biotech Corp.*, 630 A.2d 805 (N.J. Super. Ct. App. Div.), *certif. denied*, 636 A.2d 522 (1993) and *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128 (E.D.N.Y. 1992)). As indicated above, however, § 136v(b) expressly preempts states from imposing "*any* requirements for labeling" in addition to or different from the EPA's. 7 U.S.C. § 136v(b) (emphasis added). Petitioner's argument would require the manufacturer to provide additional warnings totally outside the scope of the warnings reviewed and approved by EPA.

Furthermore, requiring additional non-label warnings would undermine the very reason for establishing the EPA's uniform labeling review and approval process. Other courts

In sum, this Court decided the issue raised in this case in *Cipollone*, a fact recognized by the scores of state and federal courts that have applied the *Cipollone* holding and have uniformly found FIFRA preemption. There is simply no reason for the Court to hear this case.

CONCLUSION

For the reasons discussed above, Respondent Elf Atochem North America, Inc. respectfully asks that this Court deny the petition for writ of certiorari.

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have rejected similar arguments that a manufacturer should be required to provide non-label warnings, concluding that such claims necessarily challenge the adequacy of EPA-approved warnings. As the Eleventh Circuit stated, "any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging." *Papas II*, 985 F.2d at 519. Since Petitioner does not contest that Elf Atochem placed EPA-approved warnings and instructions on its Penncap-M label and packaging, "its duty to warn is satisfied, and the adequate warning issue ends." *Id.*

IN THE DISTRICT OF VALLEY COUNTY, NEBRASKA

GARY E. ACKLES, Plaintiff, vs. PENNWALT CORPORATION n/k/a ELF ATOCHEM NORTH AMERICAN, INC., A Foreign Corporation, Defendant.	)	DOC. 21 PAGE 277 CASE NO. 6277 SEVENTH AMENDED PETITION AT LAW

Plaintiff states:

INTRODUCTORY ALLEGATIONS

1. That plaintiff is a resident of Ord, Valley, County, Nebraska.

2. That defendant Pennwalt Corporation, now known as Elf Atochem North American, Inc., is a corporation organized in a state other than Nebraska with its principal place of business in Pennsylvania.

3. That on August 2, 1991, between 10:45 a.m. and 11:00 a.m., while plaintiff was delivering mail in Valley County, Nebraska, he became exposed to a pesticide identified as Penncap-M, which pesticide was being sprayed on corn in a field adjacent to the road where plaintiff was delivering the mail.

4. Said pesticide was manufactured, marketed and sold by defendant.

5. That upon information and belief, plaintiff states that the field being sprayed was located within the following legal description:

> The Northeast one-quarter (NE 1/4) of Section 21, Township 18 North, Range 14 West, the 6th PM, in Valley County, Nebraska.

6. That on August 2, 1991, Brady Coen was the pilot and applicator who was spraying the pesticide described above on the field described above.

7. That as plaintiff was driving his car with the window down, the fumes from the pesticide known as Penncap-M were ingested by plaintiff, and upon plaintiff ingesting these fumes he became nauseated and ill.

8. That on August 4, 1991, plaintiff was admitted to Good Samaritan Hospital in Kearney, Nebraska with an admission diagnosis of "exposure to organophophate poisoning" and was eventually discharged on August 11, 1991.

9. That as a direct and proximate result of the negligence and breach of warranty by the defendant, as more fully described below, the plaintiff sustained damages, as more fully described in paragraph 19 below.

FIRST THEORY OF RECOVERY

NEGLIGENCE

Plaintiff realleges Paragraphs 1 through 9, as if fully set forth herein.

10. That the defendant had a duty to exercise reasonable care and caution concerning the design, production, manufacture and distribution of the pesticide which is the subject matter of this Petition.

11. That the defendant violated its duties to the plaintiff and others similarly situated, in one or more of the following particulars:

a) In negligently designing, producing, manufacturing, distributing and selling this product so that as a proximate result thereof plaintiff was injured;

b) In negligently failing to conduct sufficient, reasonable and adequate comprehensive research concerning the product;

c) In negligently failing to make adequate and sufficient testing of this product;

d) In negligently failing to adequately and properly inspect this product;

e) In negligently designing, producing, manufacturing, distributing and selling this product without making adequate safety provisions or carrying out safety measure relating to this product;

f) In negligently designing, manufacturing and selling this product which was inherently dangerous when produced and sold, and likely to inflict unreasonable risk of harm;

g) In negligently failing to perform its continuing non-delegable duties with respect to this product to withdraw it from the market for use due to lack of safety.

12. As a direct and proximate result of the defendant's negligence, as set forth above, plaintiff has sustained damages as set forth in Paragraph 19 below.

SECOND THEORY OF RECOVERY

BREACH OF IMPLIED WARRANTIES

Plaintiff realleges Paragraphs 1 through 12 as if fully set forth herein.

13. That the defendant impliedly warranted that the pesticide sprayed would be fit for the purpose intended.

14. That the defendant impliedly warranted that the pesticide would be free from defects creating an unreasonable risk of harm.

15. That the defendant impliedly warranted that the pesticide would be manufactured and distributed consistent with good safety practices, including adequate safety precautions, and be of merchantable quality.

16. That the pesticide, which is the subject matter of this action, was not of merchantable quality, nor was it fit, safe or in proper condition for the use in which it was designed to be used.

17. That the defendant breached one or [sic] of the aforesaid warranties.

18. That the breach of the defendant's implied warranties was a proximate cause of plaintiff's injuries.

19. Plaintiff has sustained the following by way of damages:

a) Organophosphate poisoning;

b) Depression and anxiety;

c) Physical pain and mental suffering in the past and it is reasonably certain that plaintiff will incur physical pain and mental suffering in the future;

d) Medical bills in the past and it is reasonably certain that plaintiff will sustain medical bills in the future;

e) Loss of wages in the past and it is reasonably certain that plaintiff will sustain future loss of wages; and,

f) Permanent impairment of plaintiff's earning capacity;

g) Permanent injury; and

h) Permanent disability.

20. Plaintiff was 52 years of age at the time of this incident and had a life expectancy of 23.3 years.

21. Plaintiff's wife, Jeanne Ackles, has assigned to plaintiff in writing all causes of action she may have as a result of this accident. A copy of said Assignment is attached hereto, marked Exhibit "A" and incorporated herein by reference.

WHEREFORE, plaintiff prays for judgment on his First and Second Theories of Recovery against defendant for his special damages, general damages as allowed by law, interest and costs.

DATED this 23rd day of July, 1997.

GARY E. ACKLES, Plaintiff

By: /s/ J. Marvin Weems #14428
P.O. Box 170
Ord, Nebraska 68862
(308) 728-3285

and E. Terry Sibbernsen #13826
Mandy L. Stringenz #20208
E. TERRY SIBBERNSEN, P.C.
8805 Indian Hills Drive, #325
Omaha, NE 68124
(402) 493-7221

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was mailed by regular U.S. mail to Brian Nolan, 300 S. 19th St. #302, Omaha, Nebraska 68102, on the 23rd day of July, 1997.

/s/

EXHIBIT "A"

ASSIGNMENT

KNOW ALL MEN BY THESE PRESENTS, that I, Jeanne Ackles, of Ord, Valley County, Nebraska, in consideration of the sum of One and No/100 Dollars ($1.00) and other good, valuable and sufficient consideration to me paid, the receipt whereof is hereby confessed and acknowledged, do hereby sell, assign, transfer, deliver and set over unto Gary E. Ackles, his executors, administrators and assigns, and to him and their own proper use

and benefit, any and all sums of money due and owing to us, and all claims demands and cause or causes of action of any kind whatsoever which we have had or now have or may have against Dick Luttrell and Pletcher Flying Service, Inc., a corporation, by reason of the medical, hospital and other expenses which I have incurred by reason of injuries sustained by my husband Gary E. Ackles as a result of an accident which occurred on August 2, 1991, in Ord, Valley County, Nebraska.

I hereby constitute and appoint Gary E. Ackles, his executors, administrators and assigns, my true and lawful attorney with full power of substitution and revocation for me in my own name, but for the sole use and benefit of Gary E. Ackles, his executors, administrators and assigns, to ask, collect, demand and use for, in his own name and right, and to receive, compound and give acquittances for the claim or claims of any party thereof.

WITNESS my hand this 8th day of February, 1993.

/s/
JEANNE ACKLES